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LEADING CASES
IN
WORKMEN'S COMPENSATION.

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LEADING CASES

IN

WORKMEN'S COMPENSATION.

BY

G. N. W. THOMAS, M.B., CH.B.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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PREFACE.

A " LEADING " case has been defined as one which " establishes some point or principle of real practical importance ".

As in other branches of Law, so also with regard to Workmen's Compensation, certain judgments in the House of Lords and Court of Appeal stand out prominently, in that they enunciate principles and interpret statutory provisions and phraseology which previously had been more or less ambiguous in import.

In the following pages will be found reports of fifty-six of what may be considered the more important cases on the Law of Workmen's Compensation as it stands to-day : of this number thirty-four are House of Lords cases, and the remainder are judgments of the Court of Appeal.

G. N. W. T.

January, 1913.

ARRANGEMENT OF CASES.

WHAT IS AN ACCIDENT?

	PAGE
Fenton <i>v.</i> Thorley & Co., Ltd.	1
Brintons, Ltd. <i>v.</i> Turvey	2
Ismay, Imrie & Co. <i>v.</i> Williamson	5
Eke <i>v.</i> Hart-Dyke	7

STATEMENTS OF A DECEASED PERSON.

Gilbey <i>v.</i> Great Western Railway Co.	12
--	----

ACCIDENTS WITHOUT THE UNITED KINGDOM.

Tomalin <i>v.</i> S. Pearson & Son, Ltd.	15
--	----

PROOF OR CONJECTURE?

Barnabas <i>v.</i> Bersham Colliery Co.	17
Southall <i>v.</i> Cheshire County News Co., Ltd.	19

DID THE ACCIDENT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT?

Marshall <i>v.</i> Owners of S.S. "Wild Rose"	21
"Swansea Vale," S.S. (owners of) <i>v.</i> Rice	24
Moore (pauper) <i>v.</i> Manchester Liners, Ltd.	26
Kitchenham <i>v.</i> The S.S. "Johannesburg" (owners of)	28
Jackson (pauper) <i>v.</i> General Steam Fishing Co., Ltd.	30
Fletcher (formerly Hewitt) <i>v.</i> S.S. "Duchess" (owners of)	34
Reed <i>v.</i> Great Western Railway Co.	34
Astley <i>v.</i> Richard Evans & Co., Ltd.	36
Gane <i>v.</i> Norton Hill Colliery Co.	40
Walters <i>v.</i> Staveley Coal and Iron Co., Ltd.	41
Pierce <i>v.</i> The Provident Clothing and Supply Co., Ltd.	43

A QUESTION OF FACT.

Smith <i>v.</i> General Motor Cab Co., Ltd.	44
Warner <i>v.</i> Couchman	46

"WORK UNDERTAKEN BY THE PRINCIPAL."

	PAGE
Skates v. Jones & Co.	48

CASUAL LABOUR.

Hill v. Begg	50
------------------------	----

CLAIM.

Thompson (pauper) v. R. W. Gould & Co., Ltd.	52
--	----

JURISDICTION OUSTED.

Horn v. The Lords Commissioners of the Admiralty	54
--	----

MEDICAL EXAMINATION.

Morgan v. William Dixon, Ltd.	55
---------------------------------------	----

SURGICAL OPERATION.

Marshall v. Orient Steam Navigation Co., Ltd.	57
---	----

ACCELERATION OF DISEASE.

Ystradowen Colliery Co., Ltd. v. Griffiths	59
Clover, Clayton & Co. v. Hughes	61

MISCONDUCT OF THE WORKMAN.

Pope v. Hill's Plymouth Co., Ltd.	66
Weighill v. South Hetton Coal Co., Ltd.	67
George v. The Glasgow Coal Co., Ltd.	70
Barnes v. Nunnery Colliery Co., Ltd.	73

NEGLIGENCE OF FELLOW-WORKMEN.

Lees and Sykes (Third parties) v. Dunkerley Brothers	77
--	----

MURDER OF WORKMAN.

Nisbet v. Rayne & Burn	79
----------------------------------	----

INJURY DUE TO "HORSE-PLAY".

Fitzgerald v. Clarke & Son	80
--------------------------------------	----

NO INDEMNITY TO A JOINT TORT-FEASOR.

William Cory & Sons, Ltd. v. Wm. France, Fenwick & Co., Ltd.	82
--	----

BANKRUPTCY OR WINDING UP.

King v. Phoenix Assurance Co.	83
---------------------------------------	----

DEPENDENCY.

	PAGE
United Collieries, Ltd. v. Hendry	85
Howell v. Bradford & Co.	87
Hodgson v. Owners of West Stanley Colliery	89
New Monckton Collieries, Ltd. v. Keeling	92
Orrell Colliery Co. v. Schofield	94
Tamworth Colliery Co., Ltd. v. Hall	96

CONCURRENT CONTRACTS OF SERVICE.

S.S. " Raphael " (owners of) v. Brandy	97
--	----

PREVIOUS PAYMENTS.

McDermott v. S.S. " Tintoretto " (owners of)	98
--	----

PERQUISITES.

Skailes v. Blue Anchor Line, Ltd.	100
---	-----

COMPUTATION OF EARNINGS.

Anslow v. Cannock Chase Colliery Co.	102
--	-----

PROSPECTIVE AWARD.

Baker v. Jewell	106
---------------------------	-----

NO SET OFF.

B. Hosegood & Sons v. Wilson	107
--	-----

PROBABLE EARNINGS.

Vickers, Sons & Maxim, Ltd. v. Evans	109
--	-----

SUSPENSORY AWARD.

Birmingham Cabinet Manufacturing Co. v. Dudley	111
--	-----

TERMINATION OF WEEKLY PAYMENT.

Nicholson v. Piper	112
------------------------------	-----

TERMINATION OF AGREEMENT.

Taylor v. London & North-Western Railway Co.	114
--	-----

IS THE UNEMPLOYMENT DUE TO THE INJURY OR TO THE STATE OF THE LABOUR MARKET?

Cardiff Corporation v. Hall	116
---------------------------------------	-----

DISFIGUREMENT.

Ball v. William Hunt & Sons, Ltd.	119
---	-----

ALPHABETICAL LIST OF LEADING CASES.

A.

	PAGE
<i>Anslow v. Cannock Chase Colliery Co.</i> [1909]. House of Lords. A.C. 435; 78 L.J. (K.B.) 679; 100 L.T. 786; 53 S.J. 519; 25 T.L.R. 570; 2 B.W.C.C. 365	102
<i>Astley v. Richard Evans & Co., Ltd.</i> [1911]. House of Lords. A.C. 674; 105 L.T. 385; 55 S.J. 687; 27 T.L.R. 557; 4 B.W.C.C. 319	36

B.

<i>Baker v. Jewell</i> [1910]. Court of Appeal. 2 K.B. 673; 79 L.J. (K.B.) 1092; 103 L.T. 173; 3 B.W.C.C. 503	106
<i>Ball v. William Hunt & Sons, Ltd.</i> [1912]. House of Lords. A.C. 496; 81 L.T. (K.B.) 782; W.N. 145; 28 T.L.R. 428; 5 B.W.C.C. 459	119
<i>Barnabas v. Bersham Colliery Co.</i> [1910]. House of Lords. 103 L.T. 513; 55 S.J. 63; 48 S.L.R. 727; 4 B.W.C.C. 119	17
<i>Barnes v. Nunnery Colliery Co., Ltd.</i> (1911). House of Lords. [1912] A.C. 44; 5 B.W.C.C. 195	73
<i>Birmingham Cabinet Manufacturing Co. v. Dudley</i> [1910]. Court of Appeal. 102 L.T. 619; 3 B.W.C.C. 169	111
<i>Brintons, Ltd. v. Turvey</i> [1905]. House of Lords. A.C. 230; 74 L.J. (K.B.) 474; 92 L.T. 578; 53 W.R. 641; 21 T.L.R. 444; 7 W.C.C. 1	2

C.

<i>Cardiff Corporation v. Hall</i> [1911]. Court of Appeal. 1 K.B. 1009; 80 L.J. (K.B.) 644; 104 L.T. 467; 27 T.L.R. 339; 4 B.W.C.C. 159	116
<i>Clover, Clayton & Co. v. Hughes</i> [1910]. House of Lords. A.C. 242; 79 L.J. (K.B.) 470; 102 L.T. 340; 54 S.J. 375; 26 T.L.R. 359; 47 S.L.R. 885; 3 B.W.C.C. 275	61
<i>Wm. Cory & Sons, Ltd. v. Wm. France, Fenwick & Co., Ltd.</i> (1910). Court of Appeal. [1911] 1 K.B. 114; 80 L.J. (K.B.) 341; 103 L.T. 649; 11 Asp. M.C. 499; 55 S.J. 10; 27 T.L.R. 18	82

E.

<i>Eke v. Hart-Dyke</i> [1910]. Court of Appeal. 2 K.B. 677; 80 L.J. (K.B.) 90; 103 L.T. 174; 26 T.L.R. 613; 3 B.W.C.C. 482	7
--	---

F.

	PAGE
<i>Fenton v. Thorley & Co., Ltd.</i> [1903]. House of Lords. A.C. 443; 72 L.J. (K.B.) 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684; 5 W.C.C. 1	1
<i>Fitzgerald v. Clarke & Son</i> [1908]. Court of Appeal. 2 K.B. 796; 99 L.T. 101; 77 L.J. (K.B.) 1018; 1 B.W.C.C. 197	80
<i>Fletcher</i> (formerly <i>Hewitt</i>) <i>v. S.S. "Duchess"</i> (owners of) [1911]. House of Lords. A.C. 671; 105 L.T. 121; 55 S.J. 598; 27 T.L.R. 508; 4 B.W.C.C. 317	34

G.

<i>Gane v. Norton Hill Colliery Co.</i> [1909]. Court of Appeal. 2 K.B. 539; 78 L.J. (K.B.) 921; 100 L.T. 979; 25 T.L.R. 640; 2 B.W.C.C. 42	40
<i>George v. The Glasgow Coal Co.</i> (1908). House of Lords. [1909] A.C. 123; 78 L.J. (P.C.) 47; 99 L.T. 782; 46 S.L.R. 28; 25 T.L.R. 57; 2 B.W.C.C. 125	70
<i>Gilbey v. Great Western Railway Co.</i> [1910]. Court of Appeal. 102 L.T. 202; 3 B.W.C.C. 135	12

H.

<i>Hill v. Begg</i> [1908]. Court of Appeal. 2 K.B. 802; 77 L.J. (K.B.) 1074; 99 L.T. 104; 27 T.L.R. 711; 1 B.W.C.C. 320	50
<i>Hodgson v. Owners of West Stanley Colliery</i> [1910]. House of Lords. A.C. 229; 79 L.J. (K.B.) 356; 102 L.T. 194; 54 S.J. 403; 26 T.L.R. 333; 47 S.L.R. 881; 3 B.W.C.C. 260	89
<i>Horn v. The Lords Commissioners of the Admiralty</i> (1910). Court of Appeal. 80 L.J. (K.B.) 278; [1911] 1 K.B. 24; 103 L.T. 614; 27 T.L.R. 84; 4 B.W.C.C. 1	54
<i>B. Hosegood & Sons v. Wilson</i> (1910). Court of Appeal. 80 L.J. (K.B.) 519; [1911] 1 K.B. 30; 103 L.T. 616; 27 T.L.R. 88; 4 B.W.C.C. 30	107
<i>Howell v. Bradford & Co.</i> [1911]. Court of Appeal. 104 L.T. 433; 4 B.W.C.C. 203	87

I.

<i>Ismay, Imrie & Co. v. Williamson</i> [1908]. House of Lords. A.C. 437; 99 L.T. 595; 77 L.J. (P.C.) 107; 24 T.L.R. 881; 42 Ir.L.T. 213; 146 S.L.R. 699; 1 B.W.C.C. 232	5
--	---

J.

<i>Jackson (pauper) v. General Steam Fishing Co., Ltd.</i> [1909]. House of Lords. A.C. 523; 46 S.L.R. 901; 78 L.J. (P.C.) 148; 101 L.T. 401; 53 S.J. 763; 25 T.L.R. 787; 2 B.W.C.C. 56	30
---	----

K.

<i>King v. Phoenix Assurance Co.</i> [1910]. Court of Appeal. 2 K.B. 666; 80 L.J. (K.B.) 44; 103 L.T. 53; 3 B.W.C.C. 442	83
<i>Kitchenham v. The S.S. "Johannesburg"</i> owners [1911]. House of Lords. A.C. 417; 105 L.T. 118; 55 S.J. 599; 27 T.L.R. 504; 4 B.W.C.C. 311	28

L.

	PAGE
Lees and Sykes (Third parties) <i>v.</i> Dunkerley Brothers (1910). House of Lords [1911]. A.C. 5; 80 L.J. (K.B.) 135; 103 L.T. 467; 55 S.J. 44; 48 S.L.R. 724; 4 B.W.C.C. 115	77

M.

Marshall <i>v.</i> Orient Steam Navigation Co., Ltd. (1909). Court of Appeal. 79 L.J. (K.B.) 204; [1910] 1 K.B. 79; 101 L.T. 584; 26 T.L.R. 70; 54 Sol. Jo. 64; 3 B.W.C.C. 15	57
Marshall <i>v.</i> Owners of S.S. "WildRose" [1910]. House of Lords. A.C. 486; 79 L.J. (K.B.) 912; 103 L.T. 114; 11 Asp. M.C. 409; 54 S.J. 678; 26 T.L.R. 608; 48 S.L.R. 701; 3 B.W.C.C. 514	21
McDermott <i>v.</i> S.S. "Tintoretto" (owners of) (1910). House of Lords [1911]. A.C. 35; 80 L.J. (K.B.) 161; 103 L.T. 769; 11 Asp. M.C. 515; 55 S.J. 124; 27 T.L.R. 149; 4 B.W.C.C. 123	98
Moore (pauper) <i>v.</i> Manchester Liners, Ltd. [1910]. House of Lords. A.C. 498; 79 L.J. (K.B.) 1175; 103 L.T. 226; 26 T.L.R. 618; 54 S.J. 703; 48 S.L.R. 709; 3 B.W.C.C. 527	26
Morgan <i>v.</i> William Dixon, Ltd. (1911). House of Lords. W.N. 220; 105 L.T. 678; 49 S.L.R. 45 [1912]; A.C. 74; 5 B.W.C.C. 184	55

N.

New Monckton Collieries, Ltd. <i>v.</i> Keeling [1911]. House of Lords. A.C. 648; 105 L.T. 337; 27 T.L.R. 551; 55 Sol. Jo. 687; 4 B.W.C.C. 332	92
Nicholson <i>v.</i> Piper [1907]. House of Lords. A.C. 215; 76 L.J. (K.B.) 856; 97 L.T. 119; 23 T.L.R. 620; 51 Sol. Jo. 569; 45 S.L.R. 620; 9 W.C.C. 128	112
Nisbet <i>v.</i> Rayne & Burn [1910]. Court of Appeal. 2 K.B. 689; 103 L.T. 178; 54 S.J. 719; 26 T.L.R. 632; 3 B.W.C.C. 507	79

O.

Orrell Colliery Co. <i>v.</i> Schofield [1909]. House of Lords. A.C. 433; 78 L.J. (K.B.) 677; 100 L.T. 786; 53 S.J. 518; 25 T.L.R. 569. 2 B.W.C.C. 294, 301	94
---	----

P.

Pierce <i>v.</i> The Provident Clothing and Supply Co., Ltd. [1911]. Court of Appeal. 1 K.B. 997; 80 L.J. (K.B.) 831; 104 L.T. 473; 55 S.J. 363; 27 T.L.R. 299; 4 B.W.C.C. 242	43
Pope <i>v.</i> Hill's Plymouth Co., Ltd. [1911]. House of Lords. 105 L.T. 678; 5 B.W.C.C. 175	66

R.

"Raphael," S.S. (owners of) <i>v.</i> Brandy [1911]. House of Lords. A.C. 413; 55 S.J. 579; 27 T.L.R. 497; 4 B.W.C.C. 307	97
Reed <i>v.</i> Great Western Railway Co. [1909]. House of Lords. A.C. 31; 78 L.J. (K.B.) 31; 99 L.T. 781; 25 T.L.R. 36; 46 S.L.R. 700; 2 B.W.C.C. 109	34

S.

	PAGE
<i>Skailles v. Blue Anchor Line, Ltd.</i> (1910). Court of Appeal. 80 L.J. (K.B.) 442; [1911] 1 K.B. 360; 103 L.T. 741; 55 S.J. 107; 27 T.L.R. 119; 4 B.W.C.C. 16	100
<i>Skates v. Jones & Co.</i> [1910]. Court of Appeal. 2 K.B. 903; 26 T.L.R. 643; 103 L.T. 409; 3 B.W.C.C. 460	48
<i>Smith v. General Motor Cab Co., Ltd.</i> [1911]. House of Lords. A.C. 188; 80 L.J. (K.B.) 839; 105 L.T. 113; 55 S.J. 439; 27 T.L.R. 370; 4 B.W.C.C. 249	44
<i>Southall v. Cheshire County News Co., Ltd.</i> [1912]. Court of Appeal. 5 B.W.C.C. 251	19
" <i>Swansea Vale</i> ," S.S. (owners of) <i>v. Rice</i> (1911). House of Lords [1912]. A.C. 238; 104 L.T. 658; 55 S.J. 497; 27 T.L.R. 440; 48 S.L.R. 1095; 4 B.W.C.C. 298	24

T.

<i>Tamworth Colliery Co., Ltd. v. Hall</i> [1911]. House of Lords. A.C. 665; 105 L.T. 449; 55 S.J. 615; 4 B.W.C.C. 313	96
<i>Taylor v. London & North-Western Railway Co.</i> [1912]. House of Lords. A.C. 242; W.N. 53; 5 B.W.C.C. 218	114
<i>Thompson (pauper) v. R. W. Gould & Co.</i> [1910]. House of Lords. A.C. 409; 79 L.J. (K.B.) 905; 54 S.J. 599; 103 L.T. 81; 26 T.L.R. 526; 48 S.L.R. 685; 3 B.W.C.C. 392	52
<i>Tomalin v. S. Pearson & Son, Ltd.</i> [1909]. Court of Appeal. 2 K.B. 61; 78 L.J. (K.B.) 863; 100 L.T. 685; 25 T.L.R. 477; 2 B.W.C.C. 1	15

U.

<i>United Collieries, Ltd. v. Hendry</i> [1909]. House of Lords. A.C. 383; 78 L.J. (P.C.) 129; 101 L.T. 129; 53 S.J. 630; 25 T.L.R. 678; 46 S.L.R. 480; 2 B.W.C.C. 308	85
--	----

V.

<i>Vickers, Sons & Maxim, Ltd. v. Evans</i> [1910]. House of Lords. A.C. 444; 103 L.T. 292; 26 T.L.R. 548; 48 S.L.R. 697; 3 B.W.C.C. 405	109
--	-----

W.

<i>Walters v. Staveley Coal and Iron Co., Ltd.</i> [1911]. House of Lords. 105 L.T. 119; 55 S.J. 579; 4 B.W.C.C. 303	41
<i>Warner v. Couchman</i> (1911). House of Lords [1912]. A.C. 35; 28 T.L.R. 58; 105 L.T. 675; 5 B.W.C.C. 177	46
<i>Weighill v. South Hetton Coal Co., Ltd.</i> [1911]. Court of Appeal. 2 K.B. 757; 4 B.W.C.C. 141	67

Y.

<i>Ystradowen Colliery Co., Ltd. v. Griffiths</i> [1909]. Court of Appeal. 2 K.B. 533; 78 L.J. (K.B.) 1044; 100 L.T. 869; 25 T.L.R. 622; 2 B.W.C.C. 357	59
---	----

TABLE OF CASES CITED.

A.

	PAGE
Armitage v. Lancashire and Yorkshire Railway Co. [1902]. Court of Appeal. 2 K.B. 178; 66 J.P. 613; 71 L.J. (K.B.) 778; 86 L.T. 883; 18 T.L.R. 648; 4 W.C.C. 5	81-2
Astley v. Evans & Co., Ltd. [1911]. House of Lords. A.C. 674; 105 L.T. 385; 55 S.J. 687; 27 T.L.R. 557; 4 B.W.C.C. 319	20
Aveson v. Lord Kinnaird [1805]. 6 East. 188	14

B.

Bailey v. Kenworthy [1908]. Court of Appeal. 1 K.B. 441; 77 L.J. (K.B.) L.T. 327; 24 T.L.R. 186; 1 B.W.C.C. 351	103
Brice v. Edward Lloyd, Ltd. [1909]. Court of Appeal. 2 K.B. 804; 79 L.J. (K.B.) 37; 101 L.T. 472; 53 S.J. 744; 25 T.L.R. 759; 2 B.W.C.C. 26	75
Brintons v. Turvey [1905]. House of Lords. A.C. 230; 74 L.J. (K.B.) 474; 92 L.T. 578; 53 W.R. 641; 21 T.L.R. 444; 7 W.C.C. 1	6, 7, 8, 11, 12
Broderick v. London County Council [1908]. Court of Appeal. 2 K.B. 807; 99 L.T. 569; 24 T.L.R. 822; 1 B.W.C.C. 219	10

C.

Cardiff Corporation v. Hall [1911]. Court of Appeal. 1 K.B. 1009; 80 L.J. (K.B.) 644; 104 L.T. 467; 27 T.L.R. 339; 4 B.W.C.C. 159	121
Carlin v. Stephen & Sons, Ltd. [1911]. Court of Session. S.C. 901; 48 S.L.R. 862; 5 B.W.C.C. 486	122
Challis v. London & South-Western Railway Co. [1905]. Court of Appeal. 2 K.B. 154; 74 L.J. (K.B.) 569; 93 L.T. 330; 53 W.R. 613; 21 T.L.R. 486; 7 W.C.C. 23	82
Clover, Clayton & Co. v. Hughes [1910]. House of Lords. A.C. 242; 79 L.J. (K.B.) 470; 102 L.T. 340; 54 S.J. 375; 26 T.L.R. 359; 47 S.L.R. 885; 3 B.W.C.C. 275	18
Cremins v. Guest, Keen & Nettlefolds, Ltd. [1908]. Court of Appeal. 1 K.B. 469; 77 L.J. (K.B.) 326; 24 T.L.R. 189; 1 B.W.C.C. 160	40

D.

Dittmar v. Wilson, Sons & Co. [1909]. Court of Appeal. 1 K.B. 389; 78 L.J. (K.B.) 523; 100 L.T. 212; 25 T.L.R. 188; 2 B.W.C.C. 178	49
Dobby v. Wilson, Pease & Co. [1909]. Court of Appeal. 2 B.W.C.C. 370	117
Dothie v. Robert Macandrew & Co. [1908]. Court of Appeal. 1 K.B. 803; 77 L.J. (K.B.) 388; 98 L.T. 495; 24 T.L.R. 326; 1 B.W.C.C. 308	101

F.		PAGE
Fenton v. Thorley & Co., Ltd. [1903]. House of Lords.	A.C. 443 ; 72 L.J. (K.B.) 787 ; 89 L.T. 314 ; 52 W.R. 81 ; 19 T.L.R. 684 ; 15 W.C.C.	
1		4, 5, 6, 63, 64
L.		
Lysons v. Knowles & Son [1901]. House of Lords.	A.C. 79 ; 17 T.L.R. 156 ; 84 L.T. 65 ; 70 L.J. (Q.B.) 170 ; 65 J.P. 388 ; 49 W.R. 636 ; 3 W.C.C. 1	121
M.		
Main Colliery Co. v. Davies [1900]. House of Lords.	A.C. 358 ; 65 J.P. 20 ; 16 T.L.R. 460 ; 69 L.J. (Q.B.) 755 ; 83 L.T. 83 ; 2 W.C.C. 108.	91
McLean v. Moss Bay Co. [1909]. Court of Appeal.	2 K.B. 521 ; 2 B.W.C.C. 282 ; overruled [1910]. House of Lords.	
3 B.W.C.C. 402	W.N. 102 ; 54 S.J. 441 ;	91
Moore v. Manchester Liners, Ltd. [1910]. House of Lords.	A.C. 498 ; 79 L.J. (K.B.) 1175 ; 103 L.T. 226 ; 26 T.L.R. 618 ; 54 S.J. 703 ; 48 S.L.R. 709 ; 3 B.W.C.C. 527	29
N.		
Nicholson v. Piper [1907]. House of Lords.	A.C. 215 ; 76 L.J. (K.B.) 856 ; 97 L.T. 119 ; 23 T.L.R. 620 ; 51 Sol. Jo. 569 ; 45 S.L.R. 620 ; 9 W.C.C. 128	114-15
P.		
Penn v. Spiers & Pond, Ltd. [1908]. Court of Appeal.	1 K.B. 766 ; 77 L.J. (K.B.) 542 ; 98 L.T. 541 ; 24 T.L.R. 354 ; 42 Ir.L.T. 176 ; 1 B.W.C.C. 401	102
Priestley v. Fowler [1837]. 3 M. & W. 1 ; 7 L.J. (Ex.) 42 ; 1 Jur. 987 ; Murp. & H. 305		78
R.		
R. v. Foster [1834]. 6 C. & P. 325		14
Reed v. Great Western Railway Co. [1909]. House of Lords.	A.C. 31 ; 78 L.J. (K.B.) 31 ; 99 L.T. 781 ; 25 T.L.R. 36 ; 46 S.L.R. 700 ; 2 B.W.C.C. 109	33
Robertson v. Allen Brothers, Ltd. [1908]. Court of Appeal.	77 L.J. (K.B.) 1072 ; 98 L.T. 821 ; 1 B.W.C.C. 172	75
S.		
Senior v. Fountains & Burnley, Ltd. [1907]. Court of Appeal.	2 K.B. 563 ; 76 L.J. (K.B.) 928 ; 97 L.T. 562 ; 23 T.L.R. 624 ; 9 W.C.C. 116	91
Spiers v. Elderslie Steamship Co., Ltd. [1909]. Court of Session.	S.C. 1259 ; 46 S.L.R. 893 ; 2 B.W.C.C. 205	49

	PAGE
Steel <i>v.</i> Cammell, Laird & Co. [1905]. Court of Appeal. 2 K.B. 232 ; 74 L.J. (K.B.) 610 ; 93 L.T. 357 ; 53 W.R. 612 ; 21 T.L.R. 490 ; 7 W.C.C. 9	10
Stewart <i>v.</i> Wilsons & Clyde Coal Co., Ltd. [1902]. Court of Session. 5 F. 120 ; 40 S.L.R. 80	6

T.

Tutton <i>v.</i> "Majestic," S.S. owners of) [1909]. Court of Appeal. 2 K.B. 54 ; 78 L.J. (K.B.) 530 ; 100 L.T. 644 ; 53 S.J. 447 ; 25 T.L.R. 482 ; 2 B.W.C.C. 346	57
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W.

Warneken <i>v.</i> Richard Moreland & Son, Ltd. [1909]. Court of Appeal. 1 K.B. 184 ; 78 L.J. (K.B.) 332 ; 100 L.T. 12 ; 25 T.L.R. 129 ; 2 B.W.C.C. 350	58
Williams <i>v.</i> Vauxhall Colliery Co., Ltd. [1907]. Court of Appeal. 2 K.B. 433 ; 76 L.J. (K.B.) 854 ; 97 L.T. 559 ; 23 T.L.R. 591 ; 9 W.C.C. 120	88

Z.

Zugg <i>v.</i> Cunningham, Ltd. [1908]. Court of Session. S.C. 827 ; 45 S.L.R. 690 ; 1 B.W.C.C. 257	49
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LEADING CASES

IN

WORKMEN'S COMPENSATION.

WHAT IS AN ACCIDENT?

FENTON *v.* THORLEY & CO., LTD. [1903].

[HOUSE OF LORDS. A.C. 443; 72 L.J. (K.B.) 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684.]

FULLY REPORTED IN 5 W.C.C. 1.

The word "accident" denotes an unlooked-for mishap or an untoward event which is not expected or designed.

A man while doing his ordinary work, without sustaining a blow or slip, received a rupture.

Was the injury due to an accident in the meaning of the Act?

The County Court Judge and the Court of Appeal held that it was not an accident.

The House of Lords reversed this decision, and referred the case to the County Court Judge to assess compensation.

LORD MACNAGHTEN: My Lords, on 3 December, 1901, Fenton was at work at his machine. He had got through the operation on that day a good many times without hitch or difficulty; but about 9 p.m. or a little later, when the time came for opening the vessel, the wheel would not turn. He then called a fellow-workman to his assistance, and the two men together set to work to move the wheel. Suddenly Fenton felt something which he describes as a "tear" in his "inside," and it was found that he was ruptured. Fenton was a man of ordinary health and strength. There was no evidence of any slip, or wrench, or sudden jerk. It may be taken that the injury occurred while the man was engaged in his ordinary work, and in doing or trying to do the very thing which he meant to accomplish. The truth is that in the Act (1897), which does not seem to have had the benefit of careful revision, "accident" and

"injury," that is, injury by accident, appear to be used as convertible terms; for instance, in section 2, "notice of the accident" has to be given, and that notice is referred to immediately afterwards as "notice in respect of an injury under the Act".

I come, therefore, to the conclusion that the expression "accident" is used in the popular and ordinary sense of the word, as denoting an unlooked-for mishap or an untoward event which is not expected or designed.

LORD SHAND: I shall only add that concurring as I fully do in holding that the word "accident" in the statute is to be taken in its popular and ordinary sense, I think it denotes or includes any unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence.

LORD LINDLEY: The Workmen's Compensation Act, 1897, contains no definition of the word "accident," but the interpretation and legal effect of the Act, when applied to ascertained facts, are clearly questions of law as distinguished from questions of fact. I will assume for the present that it is for the plaintiff to prove personal injury caused by an accident. But when personal injury and its cause or causes have been ascertained, the question whether such cause or causes amount to an accident within the meaning of the Act is a question of law on which the decision of the County Court Judge is not final, and is not a question of fact on which his decision is not open to appeal. The word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss.

WHAT IS AN ACCIDENT?—(continued).

BRINTONS LTD. v. TURVEY [1905].

[HOUSE OF LORDS. A.C. 230; 74 L.J. (K.B.) 474; 92 L.T. 578; 53 W.R. 641; 21 T.L.R. 444.]

FULLY REPORTED IN 7 W.C.C. 1.

Absorption into the system, at a specified time, of anthrax germs, is an accident.

The respondent's husband, while employed with other workmen in sorting wool in the appellants' factory, was in-

fected with anthrax on 2 March, 1903, and died thereof on the 9th. In an arbitration held at Kidderminster, after hearing medical evidence, the County Court Judge awarded compensation to the respondent, saying: "I find as a fact that the anthrax, which was the immediate cause of death, was caused by the accidental alighting of a bacillus from the infected wool on a part of the deceased's person which afforded a harbour in which it could multiply and grow, and so cause a malignant disease and consequent death. I can see no distinction in principle between the accidental entry of a spark from an anvil, or the accidental squirting of scalding water or some poisonous liquid into the eye. The only difference is that in those cases the foreign substance would be so large as to be visible, in this case the foreign substance is microscopic. I think it immaterial whether there was in fact any external pimple or abrasion, because if there was, it was a fortuitous accident that the bacillus alighted on that particular spot. But I find in fact that there was no such abrasion or pimple. My judgment is based on the fact that there was in this case a fortuitous intrusion of a foreign substance into the eye which by its presence there caused death."

The Court of Appeal and House of Lords dismissed the appeal of the employers.

EARL OF HALSBURY, L.C. : Probably it is true to say that in the strictest sense, and dealing with the region of physical nature, there is no such thing as an accident. The smallest particle of dust swept by a storm is where it is by the operation of physical causes, which if you knew beforehand you could predict with absolute certainty that it would alight where it did. But when the Act (1897) now under construction enacted that if in any employment to which the Act applied, personal injury "by accident" arising out of and in the course of his employment is caused to a workman, his employers shall pay compensation, I think it meant that apart from negligence of any sort—either employers or employed—the industry itself should be taxed with an obligation to indemnify the sufferer for what was "an accident" causing damage.

I am therefore of opinion that the County Court Judge was quite right, and I move your Lordships accordingly.

LORD MACNAGHTEN: My Lords, on the facts found by the learned County Court Judge, I am of opinion that the decision of the Court of Appeal was right. It is plain, I think, that the mischief which befell the workman in the present case was due to accident, or rather, I should say, to a chapter of accidents. It was an accident that the noxious thing that settled on the man's face happened to be present in the materials which he was engaged in sorting. It was an accident that this noxious thing escaped the down draught or suck of the fan which the Board of Trade, as we were told, requires to be in use while work is going on in such a factory as that where the man was employed. It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye. It must have been through some accident that the poison found entrance into the man's system, for the Judge finds that there was no abrasion about the eye, while the medical evidence seems to be that without some abrasion infection is hardly possible. The result was anthrax, and the end came very speedily. Speaking for myself, I cannot doubt that the man's death was attributable to personal injury by accident arising out of, and in the course of, his employment. The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease which was immediately the cause of death, and would no doubt be certified as such in the usual death certificate.

I have nothing more to add, because the meaning of the expression "personal injury by accident," as used in the Act of 1897, was very fully considered in the case of *Fenton v. Thorley* (1903, House of Lords, A.C. 443; 5 W.C.C. 1) in this House. I am content to abide by what I am reported to have said in that case. It had the express concurrence of my noble and learned friends Lord Shand and Lord Davey, and the approval, I think, of my noble and learned friend Lord Lindley. I agree that the appeal must be dismissed with costs.

LORD LINDLEY: In this case your Lordships have to deal with death resulting from disease caused by an injury which I am myself unable to describe more accurately than by calling it purely accidental. The fact that an accident causes injury in the shape of disease does not render the cause not an accident. Whether in any particular case an injury in the shape of disease is caused by an acci-

dent or by some other cause depends on the circumstances of that case, and on the meaning to be attributed to the word "accident". The meaning of the word as used in the Workman's Compensation Act was settled by this House in *Fenton v. Thorley Co., Ltd.* (1903, A.C. 443; 5 W.C.C. 1), and having regard to that authority, and to the facts of this case as stated by the learned County Court Judge, his decision and the decision of the Court of Appeal were, in my opinion, quite right, and this appeal ought to be dismissed.

WHAT IS AN ACCIDENT?—(continued).

ISMAY, IMRIE & CO. *v.* WILLIAMSON [1908].

[HOUSE OF LORDS. A.C. 437; 99 L.T. 595; 77 L.J. (P.C.) 107; 24 T.L.R. 881; 42 Ir. L.T. 213; 146 S.L.R. 699.]

FULLY REPORTED IN 1 B.W.C.C. 232.

Death by heat-stroke may be death by accident within the meaning of the Act.

One Williamson, a brass-finisher by trade, being out of work, took a berth on board the S.S. "Majestic," as a trimmer to rake ashes from the furnaces.

He had never been a trimmer before; he was of poor physique and low vitality.

On 10 July, 1907, he entered on his duties.

On 11 July, 1907, at 1 p.m., while engaged in raking out the ashes, he fell down in a faint; he was medically attended and the usual remedies were applied; he died at 3 p.m.

The temperature where he had been working was 96 degrees.

The ventilation and condition of the employment were as usual.

The medical evidence was that owing to the man's debility he was unable to withstand the high temperature; that heat-stroke is always caused by external force, and that Williamson's death was due to heat-stroke and exhaustion.

The Recorder of Belfast awarded compensation to the widow.

The Court of Appeal in Ireland and the House of Lords (Lord Macnaghten dissenting) upheld the award and decision that the "heat-stroke" was a personal injury by accident.

LORD ASHBOURNE: My Lords, this is a claim by a widow for compensation under the Workman's Compensation Act for the death of her husband, which she says was caused by an injury received through an accident arising out of and in the course of his employment.

There is no dispute as to the facts of the case. He was employed as a trimmer on board the "Majestic". At the time of the accident he was working in a stokehole opposite the boiler; he received a heat-stroke from the rays of heat from the boiler impinging on his body; he became exhausted, and died in a few hours.

Was this an accident arising out of and in the course of his employment? With great deference to those who hold a contrary opinion, I can myself see no room for serious doubt on the subject. Everything was in the course of his employment and arising out of it. But for the boiler and the heat-stroke, and the speedy exhaustion it caused, there would have been no accident.

If the Act is to be interpreted according to its "ordinary and popular meaning," as Lord Halsbury said was right in *Brintons v. Turvey* (1905, A.C. 230), would not the generality of mankind say that what occurred was an injury caused by an accident? The authorities support this view.

In *Fenton v. Thorley* (1903, A.C. 443; 5 W.C.C. 1), where a man ruptured himself in an exertion during his employment, Lord Macnaghten laid down that an "accident is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap, or an untoward event which is not expected or designed". Lord Lindley in the same case said that "in the Act the word is used in a very loose way," that it meant "any unintended and unexpected occurrence which produces hurt or loss". The Scotch case of *Stewart v. Wilson's and Clyde Coal Co.* (1902, 5 F. 120), referred to with approval by Lord Macnaghten and Lord Lindley, is a valuable authority. In that case Lord McLaren said: "If a workman in the reasonable performance of his duties sustains

a physiological injury as the result of the work he is engaged in, this is an accidental injury in the sense of the statute”.

The case of *Brintons v. Turvey* (1905, A.C. 230 ; 7 W.C.C. 1), the anthrax case, went, if possible, farther, and there Lord Macnaghten reaffirmed his definition of “accident”. In my opinion every word of that definition applies to the facts of this case, which are in many ways more simple and direct than those in the case of *Brintons v. Turvey*.

Although a heat-stroke may be called a disease, it is in this case, in my opinion, a disease directly caused by an accident arising out of or in the course of an employment, particularly dangerous to Williamson, in consequence of his weak state of health. Its not being scheduled as an industrial disease in the Act of 1906 does not affect the question, for the Act expressly provides that “nothing shall affect the rights of a workman to recover compensation in respect of a disease to which the section does not apply, if the disease is a personal injury by accident within the meaning of the Act”. I do not at all say that all diseases arising out of or in the course of employment should be regarded as a personal injury by accident, but I am of opinion that, under the circumstances of this case and its facts, Williamson was killed by a personal injury by accident, and that the appellants are accordingly liable.

In my opinion the appeal should be dismissed with costs.

(LORD LOREBURN, L.C., concurred, LORD MACNAGHTEN dissenting.)

WHAT IS AN ACCIDENT?—(continued).

EKE *v.* HART-DYKE [1910].

[COURT OF APPEAL. 2 K.B. 677; 80 L.J. (K.B.) 90; 103 L.T. 174; 26 T.L.R. 613.]

FULLY REPORTED IN 3 B.W.C.C. 482.

A disease is not a “personal injury by accident” within the meaning of the Act, unless it be proved to have been contracted at a particular time and place (excepting

diseases mentioned in the Third Schedule or extended Schedule by Orders of the Home Secretary).

One Eke, a gardener and caretaker of an empty house, under instructions, opened two manholes and two cesspools and examined the drains on 16, 24, and 26 July, 1909 ; in a few days he became ill and died on 30 October, 1909. Two doctors diagnosed blood poisoning as the cause of death, and due to inhaling the effluvia from the drains.

The County Court Judge found :—

1. Not possible to give a day as date under the particular circumstances. Time of accident sufficiently given under the circumstances.

2. Notice was given in November. Respondent not prejudiced in his defence nor in any way by any other notice not being given in November and December.

3. Eke died from results of poisoning contracted whilst working on the drains, whether it is called ptomaine or toxin poisoning. Ptomaine appears to be used by some in a loose sense, and was so used by the applicant's doctors in this case.

4. Accident arose out of and in the course of the employment, and awarded the applicant—the widow—compensation under the Act.

The employer appealed on the grounds, firstly, that notice of the alleged "accident" had not been given as soon as practicable, and that the employer had thereby been prejudiced in his defence, secondly, that there was no accident within the meaning of the Act.

Appeal allowed.

COZENS-HARDY, M.R. : This Court and the House of Lords have been engaged again and again in discussing that word "accident," and so far as I am aware neither this Court nor the House of Lords has ever attempted to say, or ventured to say, that a mere disease without accident, nor attributable to something which may properly be called an accident, entitles a workman to compensation under the Act. No doubt there have been some cases which were very near the line. There was the case, which is always cited on these occasions, of *Brintons Ltd. v. Turvey* (1904, 1 K.B. 328 ; 1905, A.C. 230 ; 6 W.C.C. 1 ; 7 W.C.C. 1), but in that case the decisions both in this Court and in the House of Lords entirely turned upon this,

that it was found as a fact by the learned County Court Judge, who was the judge of fact, that the anthrax of which the man died was due to the circumstances that at a particular time, and at a particular place, a particle came from the wool with which he was dealing, and impinged on a particular part, where there was more than one exposed to that particular mischief. In the face of that particular finding of fact the Court held that it was an accident, and that it was an accident which resulted in his death from anthrax. But I think all the judges carefully abstained from lending colour to the suggestion that a mere disease which you could not say was contracted at a particular time, and at a particular place, by a particular accident, was an accident which entitled a man to compensation.

I have thus far made no mention of one portion of the Act which seems to me to be of great value as explaining the position. Under the original Act, disease, apart from accident, did not entitle one to compensation. That was decided again and again. But by section 8 of the Act of 1906, the provisions of this Act were applied to certain scheduled diseases which are extended from time to time by orders made by one of the Government Departments, and that provides that where the certifying surgeon certifies a workman is suffering from a scheduled disease, and is disabled from earning full wages, or is suspended from his usual employment, or has died from such disease, "and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act, as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment. . . ." That is to say, true, it is not an accident, but the disease shall be treated as though it were a personal injury by accident ; disablement is to be treated as the happening of the accident. That is to say, not when the original source of the mischief got into the man's system, but the moment at which, and no earlier than the moment at which the actual disablement takes place. That for the purpose of the schedule of diseases is treated as an accident. Then there is a Third Schedule of the Act which mentions the diseases. The Government Department have enlarged

that schedule in various ways, but except in the case of a disease brought within one or other of these schedules, and in my opinion, except where you can indicate the time, the day, and the circumstance and place in which the accident has occurred by means of some definite event, the case cannot be brought within the general purview of the Act, and does not entitle the workman to compensation.

KENNEDY, L.T. : I quite agree, on the first point, that there is nothing in the argument of the appellant, and on the second point, I am not prepared to differ from the judgment that has been pronounced, but in saying that I must express my own very great feelings of doubt on the point. Unquestionably the different judgments delivered in the House of Lords and elsewhere on this particular point do not work out, to my mind, in any very satisfactory way as to the test which you ought to apply to such a case as the present.

Everybody agrees, of course, that in the language of the Act of Parliament, there has to be an injury by accident arising out of and in the course of the employment. That is clear. But as to what is an accident in many cases it is very difficult to say. In the case of *Broderick v. London County Council* (1908, 2 K.B. 807 ; 1 B.W.C.C. 219), I entirely assented, and I still assent, to the reasoning which was fully and clearly expressed by the Master of the Rolls in the one judgment that was given. I will say upon that, as appears on the face of the judgment, it seems to me we must always insist upon what Mathew, L.J., insisted on in *Steel v. Cammell, Laird* (1905, 2 K.B. 232 ; 7 W.C.C. 9), that where you have got a man following a dangerous occupation, and you cannot give a date, the case is not within the Act, except in regard to these particular classes of disease which are now scheduled. But where you have got what you have here—and that is why I do not dissent but agree—you have got what is an arguable and definite test sufficient for the purpose of saying there was an accident. I quite understand that people's opinions will differ on that. It is hardly a lawyer's question. A man not employed in sewer work at all, but employed as caretaker and labourer, is asked to assist in opening up a cesspool. I think there are three dates given, all within about a week, or in a short time anyhow. I cannot quite make out from the evidence read whether there were two or three, or possibly more

dates given, but, as I understand, three dates were given, and they were all within that period. They are all categorized as referring to the cesspool as A, B, and C, and it seems to me that it is impossible to put the facts of this case on the same basis of fact as that in the cases to which reference has been made, as, for instance, *Broderick v. London County Council* (*ubi supra*), where the workman was inhaling sewer gas in the course of his employment, as found by the facts, when employed by the London County Council in sewers. So, again, with other diseases which you may contract in the course of your employment. You cannot fix a date, and fixing a date means you cannot say there was an accident, because it may be the cumulative result of weeks or months, or years of such work. Here you have got a man put down to do a particular job. He goes down to it and the result is an illness, and it is found by the County Court Judge that it is due to the inhalation or getting into his body—putting it in the most general form—of a toxin in the form of bacteria. I quite see that the wording of the County Court Judge's judgment in *Brintons v. Turvey* (1904, 1 K.B. 328 ; 1905, A.C. 230; 6 W.C.C. 1; 7 W.C.C. 1) was much stronger and clearer, and I cannot help thinking that possibly it might be said that in this case the County Court Judge should have said, "I find that on one or other of the three occasions that man's body was infected and the man poisoned". I do not see why it should not have been so stated, but it is not done, but one may put it in that way. The case of catching a cold has been suggested, but on those facts I think we are getting into a different region altogether. There is no accident there; anybody might call catching a cold an accident, I think, but it is a different thing. According to the judgment of the House of Lords, if you can prove that at a date which is not so at large as to be absolutely one you cannot fix, because it covers a man's everyday employment for years or months, but such that you can say that on a particular day, though nobody saw it, a particular bacterium from say wool struck a man's eye, because his eye was afterwards found to be diseased, that is an accident.

You cannot draw any clear line of distinction between that and saying what is said here, that you find on the medical evidence that it was due to toxin poisoning which got into his body in that way. However, I agree that there is no case which, on such findings as these of the learned Judge in this case, has gone quite so

far as to decide what the learned Judge has decided here. As I say, it seems to me to be quite a satisfactory way to draw the distinction, because he went two or three times to the cesspool, and on one particular date he opened the cesspool cover, and that that logically ought to make a difference. It is all one affair, the result of which is a bacterial internal injury. I agree that in holding in favour of the findings of the learned Judge of the County Court I think we should have been going rather farther as the findings stand than any judgment that has yet been given has gone in regard to what is an accident; but we are all agreed that an accident has to be found, and an accident which has to be something of an exceptional nature, something which cannot be traced merely to the cumulative work of a dangerous process or place of work going on for years. But possibly some day or other the matter may be put more clearly. As it stands, I cannot find any authority that would justify us in upholding this judgment, although, possibly, as Lord Robertson said in that case in the House of Lords (*Brintons Ltd. v. Turvey*, 1905, A.C. 230; 7 W.C.C. 1), it is difficult to distinguish that case from such a case as the present.

FARWELL, L.J., agreed.

STATEMENTS OF A DECEASED PERSON.

GILBEY *v.* GREAT WESTERN RAILWAY CO. [1910].

[COURT OF APPEAL. 102 L.T. 202.]

FULLY REPORTED IN 3 B.W.C.C. 135.

The statements of a deceased person describing his bodily sensations or symptoms, the results of an injury, are admissible, but not his statements as to the cause of these effects.

The widow of one Gilbey, a meat porter, stated that, on going to work, her husband was spitting blood and complaining of feeling ill, and on returning from work a few hours later he said to her that in carrying some beef it slipped from his shoulder and in trying to prevent it from falling into the dirt he had given himself a "sudden jerk," and further, "I have

broken my small rib, that was the cause of it''. Gilbey died four days subsequently.

The wife admitted in cross-examination that at the inquest she had said that her husband had hurt his short rib while carrying two sheep (not beef).

Another witness, a meat porter, stated that he had seen Gilbey carrying sides of beef on the day of the alleged accident, and that Gilbey complained to him "that he had hurt himself".

It was agreed that the evidence of the medical man who made the post-mortem examination, given at the Coroner's inquest, should be read as medical evidence.

This evidence was to the effect that there were no marks of violence, no injury to the rib. That acute inflammation and pleurisy were present; that there was a tear in one lung about half an inch in length and one quarter of an inch deep.

That the heart was fatty and very soft.

That death was due to heart failure, accelerated by acute inflammation of the lung and pleurisy while suffering from laceration and tearing of the lung, and that this latter could have been caused in the manner as alleged to have been described by the deceased.

Counsel for the respondents objected to the admissibility of the above alleged statements of the deceased.

The County Court Judge admitted these statements in evidence, and made an award in favour of the widow.

The employers appealed.

Appeal allowed.

COZENS-HARDY, M.R. : The deceased man was a badge porter, a man who works in the early hours of the morning in the meat market, and who seeks and obtains employment in carrying meat from the Great Western trains to the meat market. He was undoubtedly in a very bad state of health. It is clear that on the Monday, the day before it was alleged he met with an accident, he was spitting blood. It is clear that, from the widow's evidence, on that day his wife thought he ought not to go out. Contrary to her wish he insisted on going out. When he went out late at

night it was on Monday. On Tuesday he came back to his house, having remained at his work until, I think, 'shortly before 9 o'clock. He had had a glass of ale with the man who paid him his wages. On returning home he made a statement to his wife upon which there has been some discussion. The statement that he made to his wife was not merely one as to his own feelings or sensations, but one as to the cause and occasion of the injury from which he was suffering. The County Court Judge has held that the statement was admissible in evidence. On the following Saturday the man died. On his death it was discovered that he had a serious injury to his lung, and that there was a tear in one part of the lower side of the lung. These statements made by this man to his wife and to the witness Crook were the only evidence as to the nature and occasion of the injury. I am unable to agree with Mr. O'Connor that the view taken by the Judge of the City of London Court was correct. I do not doubt that the statements, made by a man to his wife, of his sensations at the time would be admissible—that he had a pain in his side, or in his head, or what not. Such a statement would be admissible to prove his sensations, whether that statement was made by groans or by actions or by verbal statements, but to hold such statements ought to be admitted as evidence of the origin of the facts deposed to is, I think, impossible. Such a contention is contrary to all authority. We were referred to par. 580 of "Taylor on Evidence". There is not a word there to justify the further proposition that such statements are admissible as evidence of the occasion and cause of the injury. That is plain from the general principles of our law, and there is no authority to support such a contention. The facts in the case of *Aveson v. Lord Kinaird* (1805, 6 East 188) are very different from those here. *R. v. Foster* (1834, 6 C. & P. 325) is an authority for nothing more than the admission of a statement that was a part of the *res gestæ*. The statement being "I was knocked down by so and so's cart". This evidence being inadmissible there was no particle of evidence to show that this man suffered from an accident within the meaning of that term in the Act. Though it is not a matter for me, I do not believe that this man ever did suffer from an accident. The evidence that he was spitting blood on the Monday renders it far more probable that if he had suffered any wrench or tear it was on the Monday and not on the Tuesday morning. There is nothing to

connect the accident with the time when he was working for the Company. There is nothing whatever to show that the accident happened when this man was in the employment of the Great Western Railway. I think the Judge was wrong. There was no evidence before the County Court Judge that this man ever met with an accident, or if he did, that it arose out of and in the course of his employment with the Great Western Railway Co.

FLETCHER MOULTON, L.J. : I am of the same opinion. In this case the only evidence on which the claimant vested her case consisted of these statements made by the deceased man as to his having had an accident and as to the nature of the accident. I can find no case that would authorize the admission of such statements in evidence. In cases of this kind we do give considerable latitude in admitting the statements of deceased persons under the head of what is called *res gestæ*. But to admit these statements in evidence would be to go far beyond what the Court has ever sanctioned and contrary to the English law.

BUCKLEY, L.J. : I agree.

ACCIDENTS WITHOUT THE UNITED KINGDOM.

TOMALIN *v.* S. PEARSON & SON, LTD. [1909].

[COURT OF APPEAL. 2 K.B. 61 ; 78 L.J. (K.B.) 863 ; 100 L.T. 685 ; 25 T.L.R. 477.]

FULLY REPORTED IN 2 B.W.C.C. 1.

“ Any employment ” in section 1, subsection 1 of the Act is restricted to employment within the ambit of the United Kingdom, except in the case of seamen as provided by section 7.

The employers, a London firm of contractors for public works, engaged the deceased, a domiciled and resident Englishman, to go to Malta on their behalf and assist in the construction of breakwaters ; his work was that of a fitter, and he was killed at Malta while so engaged. The County Court Judge at Dover awarded compensation to the widow.

The employers appealed.

Appeal allowed.

COZENS-HARDY, M.R. : It seems to me reasonably plain that this is a case to which the presumption which is referred to in Maxwell on the "Interpretation of Statutes" (4th edit. pp. 212, 213), in the passage which has been read by Mr. Waddy, must apply. It is there stated that "In the absence of an intention clearly expressed, or to be inferred from its language or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate on them beyond the territorial limits of the United Kingdom". But if I had any doubt on the case, apart from the section to which I am about to refer, that doubt would be removed by reference to section 7 of the Act. There there is an extension of the operation of the Act to accidents occurring outside the United Kingdom. The section has a very guarded and a very limited application indeed. It applies to "masters, seamen, and apprentices to the sea service, and apprentices in the sea-fishing service, provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides, or has his principal place of business in the United Kingdom," subject to certain modifications. So that even in the case of a seaman, when the Legislature expressly desired to include them, they limited and confined it most carefully to persons who, and who alone, could claim to be entitled to the benefit of the Act. In my opinion the present claimant, who seeks to enforce her statutory right in respect of an accident that occurred in Malta, has not any right to claim the compensation which she is asking for. In my opinion, therefore, this appeal must be allowed.

MOULTON and FARWELL, L.JJ. : Agreed.

PROOF OR CONJECTURE ?

BARNABAS v. BERSHAM COLLIERY CO. [1910].

[HOUSE OF LORDS. 103 L.T. 513; 55 S.J. 63; 48 S.L.R. 727.]

FULLY REPORTED IN 4 B.W.C.C. 119.

Surmise, conjecture, or guess cannot suffice as evidence.

A collier died of apoplexy within a few hours of the attack which had occurred during working hours in a mine. The collier's work on that day was to build a "pack," but there was no evidence that apoplexy came upon him when he was incurring a strain.

The County Court Judge made an award in favour of the dependants.

The employers appealed to the Court of Appeal, where the award was set aside.

The dependants appealed to the House of Lords.

Appeal dismissed, and judgment of the Court of Appeal affirmed.

THE LORD CHANCELLOR (LOREBURN): In cases under this Act, in the same way as in cases under any other Act or at common law, the plaintiff must prove his case; and although he may establish a state of facts which leads one to think that his version is quite a possible version of what took place, he must do something more than show a state of facts which is consistent either with one view or with another view. I should myself greatly regret that we should come to this form of argument—that we should attempt to infer a conclusion of fact in one case from a comparison with other findings in other cases and upon other evidence; but that, I am sorry to say, is really the way in which the appellants here have been driven to eke out their contention. Findings of fact in one case are really no help in finding the facts in another, unless it be that they may illustrate the way in which learned judges are accustomed to look for evidence.

My Lords, is there here any evidence in support of the finding of the learned County Court Judge? The learned County Court Judge says that the deceased died "from apoplexy, brought on by

strain while engaged in the heavy work of building the 'pack'. Was there any evidence to support the finding that the apoplexy was brought on by the strain? The only piece of evidence that has been referred to is this, that the doctor says that "the man's arteries, especially the arteries of the brain, had degenerated, and great effort in doing anything might cause them to rupture; on the other hand, they might have ruptured while he was asleep in bed. The arteries were in such a state, they might rupture with slight exertion, or with no exertion at all."

My Lords, it seems to me that in this state of facts, unfortunate as it may be for the deceased and for those whom he has left behind him, we are bound to say, as a Court of Justice, that this state of facts is equally consistent with the one conclusion as with the other, and, therefore, the applicant has not made out her contention that this was a death from accident arising out of and in the course of the employment.

COZENS-HARDY, M.R.: Now what is there that is known about this case; merely that this collier died of apoplexy, and that the disability that he took with him to his work was that his arteries were in a very diseased condition and that apoplexy might have come upon him when in bed, or when walking about, or when over-exerting himself. Is it sufficient to say that when a man who is a collier is in that condition, and he dies underground in working hours from apoplexy, that he died from an accident arising out of and in the course of his employment? I think not. With some hesitation I have come to the conclusion that there was no evidence here to justify the County Court Judge finding that this man died from accident arising out of and in the course of his employment. I am quite sure that the case of *Hughes v. Clover, Clayton & Co.* (1909, 2 K.B. 798; 2 B.W.C.C. 15; 1910, A.C. 242; 3 B.W.C.C. 275) is no authority in support of the respondent's contention. In that case there was proof of what the workman was doing at the moment of the accident; he was tightening a nut with a spanner—an action which obviously involved some exertion—when a blood-vessel broke. There was a strain occurring in the ordinary discharge of the workman's duties producing the rupture. But here in this case we are entirely in the dark. There was no particle of evidence that this collier incurred any strain, even in the proper and limited sense of that word, at the time when he was seized with

apoplexy. There was nothing to show that the accident arose out of—though doubtless it arose in the course of—his employment. The appeal, therefore, must be allowed, although I come to that conclusion with some regret (*Barnabas v. Bersham Colliery Co.*, 1910, Court of Appeal; 3 B.W.C.C. 221; 101 L.T. 621).

PROOF OR CONJECTURE?—(*continued*).

SOUTHALL *v.* CHESHIRE COUNTY NEWS CO.,
LTD. [1912].

[COURT OF APPEAL.]

FULLY REPORTED IN 5 B.W.C.C. 251.

“Suicide is never to be presumed.” (COZENS-HARDY, M.R., *infra*.)

On 27 April, 1910, the deceased workman, Southall, fell from a cart and suffered a bruise over the left eye, concussion, and shock. Thirty years previously he had lost the sight of his right eye. Subsequently to 27 April, 1910, he complained of pain in the head, giddiness, depression, and loss of memory.

In December, 1910, he was stated to have had a delusion as to a prosecution regarding insurance money; that his manner was “changed” towards members of his family. He was examined on 11 and 12 December.

On 13 December, at 1.30 a.m., he rose from bed and began to dress, but was persuaded to return to bed; at 4 a.m. he was missed, and his body was afterwards found, fully dressed, in a canal 400 yards distant.

The County Court Judge found that the accident had caused a suicidal tendency, and made an award for the dependants.

The employers appealed.

Appeal allowed.

COZENS-HARDY, M.R. : I think there was no evidence to justify the finding of the Judge. There was an admitted accident to this man in April, 1910. His head was injured. He was in receipt

of compensation. He had lost one eye previously. The other eye was injured in the course of this accident. He was being attended by the doctor. On the morning of 13 December he went out of his house between 1.30 a.m. and 4 a.m., and all we know is that his body was found in the Rochdale Canal some 400 yards up, and at a distance of more than 400 yards from the house where he lived. The Judge found it was a case of suicide, and that the suicide was the result of the condition caused by the accident. In my opinion there is not a particle of evidence in support of the suicide. Suicide is never to be presumed. In the next place there is no evidence of suicidal tendency. The man's son says he never threatened suicide. There is no one who says he anticipated suicide. Strange to say, there is the report of the doctor made on the very day before the accident. He did not think there was any suicidal tendency. The Judge seems to have thought it was more likely that the man committed suicide than anything else. The Judge is not entitled to act upon a surmise of that nature. Lord Atkinson's observation in *Evans & Co., Ltd. v. Astley* (1911, A.C. 674 ; 4 B.W.C.C. 319), applies to this case : " One not infrequently finds, in cases under this Act, surmises more or less shrewd of this or that arbitrator or judge, or conjectures more or less plausible, described as inferences of fact, although there are no data whatever from which the so-called inference can reasonably be drawn ". In the present case there is no evidence to support the finding of suicide. This appeal must be allowed with the usual consequences.

FLETCHER MOULTON, L.J. : The body of the man was found in the canal. There was no evidence to show how he came there. We should presume against suicide. It is quite clear that the evidence shows that the man had suffered from his accident and that it had affected his mind so that he was restless. The possibility that it might be suicide is much greater than it would be in an ordinary case ; but it does not go beyond that. Even if we assume the man did go and walk along the bank of the canal, it was very possible he might have tripped his foot and fallen in. You have not excluded that as a reasonable possibility. Nobody suggests that the depression had ever taken any suicidal form. There was no evidence as to how he came by his death.

BUCKLEY, L.J., agreed.

DID THE ACCIDENT ARISE OUT OF AND IN THE
COURSE OF THE EMPLOYMENT ?

MARSHALL v. OWNERS OF S.S. "WILD ROSE"
[1910].

[HOUSE OF LORDS. A.C. 486; 79 L.J. (K.B.) 912; 103
L.T. 114; 11 ASP. M.C. 409; 54 S.J. 678; 26 T.L.R.
608; 48 S.L.R. 701.]

FULLY REPORTED IN 3 B.W.C.C. 514.

The mere finding of the dead body of a seaman in the water, without any evidence as to his mode of disappearance from the ship, does not warrant the inference that his death was caused by an accident arising out of his employment.

One Marshall was second engineer on board the S.S. "Wild Rose".

On 27 May, 1908, the ship was lying in Aberdeen harbour. That evening Marshall and the first engineer went on shore and returned to the ship about 10 o'clock.

Steam had to be got up by midnight.

The first engineer stated that they went to their berths and that Marshall took off his clothes excepting his trousers, shirt, and socks; that it was a very hot night, and that Marshall went on deck saying he was going for a breath of fresh air.

At 12 o'clock, when the first engineer went on deck, Marshall was missing.

Next day his dead body was found in the water close to the ship, and the part of the ship where the men were accustomed to sit.

The County Court Judge drew the inference that the deceased was drowned by accident arising out of and in the course of his employment, and made an award in favour of the widow.

The appeal of the employers was allowed by the Court of Appeal.

The widow's appeal to the House of Lords being dismissed. (Lord Loreburn, L.C., and Lord James dissenting.)

LORD SHAW: My Lords, in this case the known facts are few and simple. A sailor partially dressed left his sleeping berth in a ship lying in a tidal basin, and proceeded to the deck, having remarked to his companion that he was going up to cool himself. This happened at 10.10 on the night of 27 May, 1908. Next day his dead body was found in the harbour just under the fishboard, which was at a part of the gunwale where the members of the crew sometimes sat down. From these, which are the only facts proved, the County Court Judge inferred that the deceased met his death by accident arising out of and in the course of his employment, and he found the shipowners liable in compensation under the Act of 1906. The learned judges of the Court of Appeal have found that it is not established that the death occurred by accident arising out of and in the course of his employment. They appear to concede, or are willing to take it for granted, that the death occurred by accident, and that the accident may be looked upon as having occurred in the course of the employment, but recognizing that they are bound also before liability can emerge under the Act, to hold that the accident arose out of the employment, they cannot do so and they decide accordingly. I feel constrained to agree with their conclusion. It has been reached after great concessions or assumptions in favour of the appellant, and on those, in my opinion, it has been properly reached. But, for my own part, I do not conceal that I should have some difficulty in making those concessions or assumptions. The facts in every case may leave here and there a hiatus which only inference can fill. But in the present case the name of inference may be apt to be given to what is pure conjecture. What did the sailor Marshall do when he left his berth and went on deck? Nobody knows. All is conjecture. Did he jump overboard, walk overboard, or fall overboard? One can infer nothing; all is conjecture. Was there an accident at all, or how and why did the deceased unhappily meet his fate? No doubt the occurrence took place during the period of his engagement, but did it take place in the course of his employment, or as was justly argued, in the course of some occupation grafted on to his employment but in no way part of it, necessary to it, or usual in it? There can be, in my view, nothing dignified with the name of an inference on this subject, but again only conjecture. Finally, if mere conjecture be legitimate, how can it reach the point that an accident causing

the death by drowning of this man occurred not merely in the course of his employment but arose out of that employment? The answer to this is that he was a sailor on his ship, and the ship was surrounded by water. Had the ship been at sea one could have understood the answer better, because the sailor might have been pitched overboard by the rolling of the vessel or blown overboard by the wind. These would have been the perils surrounding the seaman's life and duty, and injuries or accidents through them might well enough be held to fall within the category of things arising out of and in the course of the employment. But in the present case such a question does not arise, for the ship was lying quietly in port. The deceased man left his sleeping berth and went on deck; and the nearest conjecture to an inference that was placed before this House was that he had seated himself on the side of the ship and fallen asleep and fell overboard. No one would attribute misconduct to him in selecting that place, or even the rigging to rest upon during the night rather than in his berth, and of course it is argued that since he was under engagement and doing no wrong the accident to him arose in the course of his employment. But how it can be said to have arisen out of it I do not understand. It arose out of some voluntary act of the deceased, in no way springing from his employment, necessary to his employment, or usual in his employment. This being so, how is the Act of Parliament to be construed? To keep to the case of death alone. The statute provides that "if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation" in respect of the workman's death. I do not see my way to hold that this is equivalent to saying that the employer is liable to pay compensation in respect of the death of any workman, should the death occur during the period and at the place of his service. To do so would, in my opinion, be to interpret language setting up definite conditions and canons of liability as if it were really a life insurance. It is settled law that a claimant, in invoking the statute, must establish that the conditions and canons of liability which it sets up have been satisfied. But the interpretation argued for by the appellant would wipe those conditions and canons out. I desire, however, specifically to guard my opinion as being any precedent in what I may call the ordinary case of a sailor, whose life is

sacrificed in circumstances of mystery—say of loneliness during a night watch, or confusion during a storm. The performance of duty in such circumstances would raise presumptions of a kind consistent with the seaman's case completely satisfying the conditions laid down by the Act. I think that the view expressed on that subject in the latter part of the judgment of Farwell, L.J., is both humane and sound. The present case, however, I hold, for the reasons above expressed, to be of a totally different character. I agree with the opinion that the appeal should be dismissed.

LORDS ATKINSON and MERSEY agreed.

DID THE ACCIDENT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT?—(*continued*).

“SWANSEA VALE,” S.S. (OWNERS OF) *v.*
RICE [1911].

[HOUSE OF LORDS. (1912) A.C. 238; 104 L.T. 658; 55
S.J. 497; 27 T.L.R. 440; 48 S.L.R. 1095.]

FULLY REPORTED IN 4 B.W.C.C. 298.

If, from the proved facts, the probabilities are greater that there was an accident arising out of and in the course of the employment, the County Court Judge may so find.

Rice, the chief officer, was in charge of the S.S. “Swansea Vale” from 4 a.m. to 8 a.m. on 30 June, 1909. During this watch he went to the captain, who gave him a doze of castor oil as he was complaining of headache, giddiness, and was “heaving”; he returned to his watch on the deck where it was his duty to be, and where he was seen up to 7 a.m. There were three other men on deck during the watch. The bulwarks were 2 ft. 9 in. high. Rice was missed between 7 and 8 o'clock. No one saw him fall overboard. The weather was fine.

The County Court Judge awarded the dependants compensation. The Court of Appeal (Buckley, L.J., dissenting) and the House of Lords affirmed the award.

THE LORD CHANCELLOR (LOREBURN): It seems to me that you have to decide each case upon its own facts, the question here being whether there is any evidence to justify the County Court Judge arriving at the conclusion at which he did arrive. I must point out that what is evidence and what is merely guessing is a matter which cannot be defined. What you want is to weigh probabilities, to see if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other. In the present case, employment on board ship necessarily exposed this unfortunate man to the danger of falling overboard. We have knowledge of certain things. He was on board this ship in the course of his employment, and therefore the accident, if it were one, happened in the course of his employment. Unquestionably he fell overboard in one way or another. That is obvious. Under these circumstances, if you exclude the possibility of suicide or murder, it must have been an accidental falling overboard, and there was an injury arising out of an accident in the course of his employment. Was it an injury or accident arising out of his employment? We know that this man at an early hour complained of being sick and giddy. He was on deck discharging a most responsible office at the very time when he disappeared from the ship. It is natural to suppose that he might be at the side of the ship for the exact purpose of his duty. It was possible also that he might have been there because he was seized with a feeling of sickness. If he fell overboard, as undoubtedly he did, by slipping or losing his balance while at the side discharging some duty, that would be an accident arising out of and in the course of his employment—looking out, for example, or anything of that kind, then unquestionably the accident arose out of his employment. If he was taken giddy while at the side, of course the accident arose out of his employment. I think that it would be the same, if, taken by nausea, he went to the side to vomit. That also would be an accident arising out of his employment. He might have been going to examine the life-boat. All these things were possible, and not an improbable explanation of what happened. The other alternatives were suicide or murder. If you weigh the probabilities one way or the other, the probabilities are distinctly greater that this man perished through an accident arising out of and in the course of his employment. I am quite

certain that the County Court Judge was entitled to come to this conclusion.

LORDS ASHBOURNE, ALVERSTONE, and SHAW agreed.

**DID THE ACCIDENT ARISE OUT OF AND IN THE
COURSE OF THE EMPLOYMENT?—(continued).**

MOORE (PAUPER) *v.* MANCHESTER LINERS, LTD.
[1910].

[HOUSE OF LORDS. A.C. 498; 79 L.J. (K.B.) 1175; 103
L.T. 226; 26 T.L.R. 618; 54 S.J. 703; 48 S.L.R. 709.]

FULLY REPORTED IN 3 B.W.C.C. 527.

“An accident befalls a man ‘in the course of’ his employment, if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time.” (LORD LOREBURN, *infra*.)

On 7 May, 1908, one Moore, a fireman on board the S.S. “Manchester Exchange” lying off South Brooklyn, New York, went on shore with four others, for the obtaining of certain necessities—soap and clothing—from a certain store, to which, it was notified by the steward of the ship, they might go, and at which they might obtain credit to a certain amount.

Moore made some purchases at this store and subsequently went to a drinking saloon. The ship was connected with the shore by a ladder—the appointed mode of access—which was tied to a stay on the ship, but was sufficiently loose to give it play with the rise and fall of the tide.

While climbing up this ladder, on his return to the ship, Moore fell into the water and was drowned.

The County Court Judge found that “the deceased met his death by falling from a ladder into the dock where he was drowned. He was returning to the ship to his duties, after an absence on lawful and ordinary business. The ladder was not fixed, and it swayed about. It was an unsafe contrivance and particularly so, at night, to a man who had been

drinking. I find, as a fact, the deceased and the others were drinking whilst on shore, but they seem to have been capable of walking back to the vessel, and I do not think that the deceased was guilty of any serious and wilful misconduct."

The County Court Judge decided that the accident arose out of and in the course of the employment and awarded in favour of the widow.

The employers appealed.

Appeal allowed by the Court of Appeal (Moulton, L.J., dissenting).

This decision of the Court of Appeal reversed by the House of Lords (Lord Macnaghten and Lord Mersey dissenting).

THE LORD CHANCELLOR (LOREBURN): My Lords, in this case a seaman, after being ashore with some of his comrades, in climbing from the quay to the ship on his return by a ladder which was not very firmly fixed, fell into the water and was drowned. How he came to be ashore is in dispute, whether on ship's business or without leave or with leave for his own purposes. Upon this question of fact I will not detain your Lordships, because Fletcher Moulton, L.J., has stated his reasons for thinking that the deceased was ashore with leave for his own purposes so clearly that I cannot do better than adopt what he says, being myself of the same opinion. In these circumstances it was not, I think, contested that the accident which caused death arose out of the employment: the danger of falling from a ladder which gave the only access from quay to ship being in its nature incidental to the service of a seaman. The point on which there was a marked and emphatic difference of opinion in the Court of Appeal was whether or not in this case the accident occurred in the course of the employment, which is quite a different question. I agree with the conclusion at which Fletcher Moulton, L.J., arrived. When we speak of a workman being employed it means that he is engaged to do certain things at certain times and in certain places. If the question be whether an accident befell him "in the course of" that employment the first inquiry is, Was he doing any of the things which he might reasonably do while so employed? A seaman going ashore without leave is not doing what he might reasonably do. He simply quits his employment for the time. Otherwise, if he goes ashore with leave,

for the employment is continuous and implies leisure as well as labour. The next inquiry is, Did the accident occur within the time covered by the employment? A man engaged for so many hours a day is in the employment only during those hours. If engaged for a month continuously day and night he is in the employment during the whole month, except, of course, during any time that he quits the employment. The last inquiry is, Did the accident occur at a place where he may reasonably be while in the employment? In some classes of work, especially where the engagement is intermittent, for so many hours a day, the place is the actual scene of his labour, a railway or quarry or factory. In other classes of work, where the engagement is continuous for day and night over a period of time, the place is wherever he may reasonably be during that time to do that thing. And so, to sum it up I think that an accident befalls a man "in the course of" his employment if it occurs while he is doing what a man so employed may reasonably do within the time during which he is employed, and at a place where he may reasonably be during that time. It may seem at first sight that this is a formidable interpretation. It is not so in reality, because in every case the accident to be a ground for compensation must also be one arising "out of" the employment. A seaman, for example, who is ashore on leave and is knocked down by a wagon, is not injured by an accident arising out of his employment. But if he is sent ashore on ship's business, he is during that errand in the same position as a messenger, and is protected against the same risks.

LORD ASHBOURNE and LORD JAMES OF HEREFORD, agreed.

DID THE ACCIDENT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT?—(*continued*).

KITCHENHAM *v.* THE S.S. "JOHANNESBURG"
(OWNERS OF) [1911].

[HOUSE OF LORDS. A.C. 417; 105 L.T. 118; 55 S.J.
599; 27 T.L.R. 504.]

FULLY REPORTED IN 4 B.W.C.C. 311.

An accident to a seaman returning to his ship "in the course of" his employment does not "arise out of"

the employment unless it be due to something specifically connected with the ship.

In this case the access to the ship was by a gangway which led from the wharf to the ship. It was sufficiently lit by a hanging lamp on the davits and a light on the quay at the shore end, and it was provided with guide ropes. The evidence showed that the sailor on returning to the ship after being absent with leave, came upon the wharf and walked towards the ship's gangway. It was not shown that he ever reached the gangway, the ship's watchman stating that he had not heard anyone on the gangway. A splash was heard near the gangway and the dead body of the seaman recovered.

The County Court Judge made an award in favour of the dependant.

The employers appealed to the Court of Appeal; appeal allowed.

The dependant appealed to the House of Lords; appeal dismissed.

LORD CHANCELLOR (LOREBURN): I am only going to say that I agree with Fletcher Moulton, L.J. In my view he states correctly the result of the decision in this House in the case of *Moore v. Manchester Liners, Ltd.* In the present case we are to say, first, whether the accident was in the course of the employment. I think that it was. The return of this man to his ship was in the course of his employment. We are next to say, Did the accident arise out of his employment? I think not. Upon the findings of the County Court Judge of fact which he states, while at the same time giving his view of the law, I think that it arose from a risk common to every one—namely falling from a quay into the water—and was not specially connected with the workman's employment.

FLETCHER MOULTON, L.J.: By going on shore with leave the seaman does not interrupt the course of his employment, but any accident that occurs during the period of his being on shore is generally, if not necessarily, due to a danger to which he is exposed as a member of the public, and not as one of the crew of the ship, and therefore is one which does not "arise out of his employ-

ment". But if whether in his hours of leisure or not, it becomes necessary for him, in fulfilment of his employment, to get on board his vessel, an accident occurring in his doing so is normally an accident arising out of his employment, because it is due to a danger incidental to his service in that ship. In the case before us the accident occurred on the return of the seaman to the ship immediately prior to his actually getting on board. This is the critical moment when the dangers to which he is exposed change from being of the one class to being of the other class, and it will frequently be a difficult task to draw the line between the two. But I do not think it difficult to lay down the general principle by which our decisions ought to be guided. The return to the ship is in the course of his employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship. Thus if the risk is one due to the means of access to the ship as in *Moore v. Manchester Liners, Ltd.*, the accident is rightly said to arise out of his employment: but if the accident is shown to arise from something not specifically connected with the ship it cannot be said to arise out of his employment (*Kitchenham v. S.S. "Johannesburg"* (Owners), Court of Appeal, 1911; 1 K.B. 523; 103 L.T. 778; Fully reported in 4 B.W.C.C. 95).

DID THE ACCIDENT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT?—(continued).

JACKSON (PAUPER) *v.* GENERAL STEAM FISHING COMPANY, LTD. [1909].

[HOUSE OF LORDS. A.C. 523; 46 S.L.R. 901; 78 L.J. (P.C.) 148; 101 L.T. 401; 53 S.J. 763; 25 T.L.R. 787.]

FULLY REPORTED IN 2 B.W.C.C. 56.

If a workman reasonably leaves his employment for refreshment necessary to the performance of his duties, and on returning to his employment sustains an accident within the ambit thereof, it arises "out of and in the course of the employment".

On 22 February, 1908, one Jackson went on duty at 4 p.m. as a watchman of four steam trawlers which were moored to Granton Quay : his duties, which were for a period of twenty-five hours, until 5 p.m. next day, made it necessary for him, sometimes, to be on the quay ; he provided his own food which was occasionally brought to him by members of his family.

Between 9 p.m. and 10 p.m. on 22 February, 1908, he went a short distance from the harbour to the Wardie Hotel, to obtain some refreshment. It was stated he was absent from the trawlers but a very short time, and that the quantity of liquor he had drunk at the hotel was a glass of beer and "half a glass" of whisky.

Jackson returned to the quay in company with two friends, and on descending the fixed ladder attached to the quay, for the purpose of getting on board one of the trawlers, he slipped and fell into the water, and was drowned.

The Sheriff-Substitute found that the accident arose out of and in the course of the employment, and made an award in favour of the widow.

The Court of Session reversed the award.

The House of Lords (Lord Loreburn, L.C., and Lord Gorell dissenting) reversed the decision of the Court of Session.

LORD ASHBOURNE : My Lords, the question in this case arises on a simple state of facts, as to which, however, different minds may arrive not unreasonably at different conclusions.

Did the accident which caused the death of the deceased arise out of and in the course of his employment ? Was there evidence on which such a conclusion might reasonably be founded ?

The deceased was employed to watch trawlers in Granton Harbour between the voyages, and sometimes it was necessary for him to be on the trawlers and sometimes on the quay. He had to provide his own food, which was sometimes brought to him by members of his family, but it is not found that he was prohibited from leaving the ambit of his duty for a short and reasonable time to get refreshment.

On the evening of 22 February he left the trawlers and went

to an hotel which is a short distance from the quay to get some refreshment, and was absent for a very short time. On returning to the quay he proceeded to descend the fixed ladder attached to the quay for the purpose of getting on board one of the trawlers, and while doing so he slipped and fell into the water and was drowned. Hence the question, Did the accident arise out of and in the course of his employment, or rather is there evidence to support such a finding?

The Sheriff-Substitute found on the facts for the claimant; but the Lord Justice Clerk and the Judges of the Second Division decided that the accident happened while the deceased was absent from the scene of his duty, and that when he was going back he was not in the course of his employment, because he had no right to be away.

If the deceased had met with a fatal accident at the hotel or before he had returned to the scene or sphere of his duty, I would be disposed to concur, but the workman had returned to the quay, where he had a right to be, and was about entering a trawler, where he had a right to go. He was within the scope and scene of his duty on both quay and trawlers; he had a right to leave the trawler for the quay, and the quay for the trawler. He was not at the time of the accident going back to or returning to his employment; he had already, I think, come back when he reached the quay, and was ready to resume his watch. He had a long guard or watch of twenty-five hours, and if it was intended that he should have no right to go "a short distance for a very short time" for refreshment, it would have been more satisfactory if there had been some finding on the subject.

On the facts as admittedly before us, I arrive at the conclusion that there was evidence that the accident arose out of and in the course of his employment, and I move, your Lordships, that the appeal be allowed with costs.

LORD JAMES OF HEREFORD: My Lords, in my opinion this appeal should succeed.

The Sheriff-Substitute has found that the deceased man Robert S. Jackson met with an accident causing his death arising out of and in the course of his employment by the defendants.

This finding may, dependent on circumstances, be regarded as one of law or of fact. If there was no evidence to support the

finding a question of law arises. If there was conflicting evidence bearing upon the issue raised, the question must be regarded as one of fact.

My opinion is that there was evidence to support the finding of the Sheriff-Substitute, and I further think that such finding was correct. There was no contract on the part of the deceased man to remain on board the trawlers. His contract could have been performed if he were on the quay. But he left both vessels and quay for the purpose of obtaining refreshment. It must have been contemplated that during the long hours of his continuous service (twenty-five hours) the deceased would need and obtain refreshments. As a rule there was no need for him to leave the quay to obtain them, but on the night of the accident the usual supply failed, and the deceased obtained refreshment at a neighbouring hotel. No argument appears to have been raised on the nature of the refreshments obtained. After leaving the hotel the deceased man returned to the quay, a place where, as I have said, he might rightly be when discharging his duties. Passing from such place in order to reach one of the trawlers he fell off a ladder and was drowned. It seems that this case differs clearly from that of *Reed v. Great Western Railway Company*, (1909) A.C. 31. In that case the deceased, in breach of his duty, left his engine and crossed the railway line in order to purchase a magazine. Such act in no way arose out of his employment, nor was it in the course thereof.

In this case the obtaining of refreshment was necessary to the performance of the deceased's duties. His passing from the quay to the trawler in my opinion arose out of and was in the course of his employment. The fact that the deceased had been to the hotel does not alter the position.

The appeal ought therefore to prevail and be allowed with costs.
LORDS ATKINSON and SHAW OF DUNFERMLINE concurred.

DID THE ACCIDENT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT?—(continued).

FLETCHER (FORMERLY HEWITT) *v.* S.S.
"DUCHESS" (OWNERS OF) [1911].

[HOUSE OF LORDS. A.C. 671; 105 L.T. 121; 55 S.J. 598;
27 T.L.R. 508.]

FULLY REPORTED IN 4 B.W.C.C. 317.

*To constitute an accident under the Act, it must arise
from something specifically connected with the employment.*

A captain of a vessel went ashore in the evening and visited an hotel, returning to the quay about 11 p.m. He returned to the quay, and hailed his ship for a boat; before it arrived he fell into the water and was drowned.

THE LORD CHANCELLOR (LOREBURN): The question which was argued before us was that this accident, which proved fatal to the unfortunate master of the vessel, arose out of his employment. He fell off the pier into the water while waiting to return to his ship. It was not established by the evidence that he had to go ashore on the ship's business, and I think that the risk from which he perished was not one specially connected with his employment, such as crossing a plank or a gangway leading to the ship or going in a boat to the ship might be. Under these circumstances I think that the conclusion at which the Court of Appeal arrived was right, and that this appeal should be dismissed.

LORDS ATKINSON, GORELL, and ROBSON concurred.

Appeal of the dependants dismissed.

DID THE ACCIDENT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT?—(continued).

REED *v.* GREAT WESTERN RAILWAY COMPANY
[1909].

[HOUSE OF LORDS. A.C. 31; 78 L.J. (K.B.) 31; 99 L.T.
781; 25 T.L.R. 36; 46 S.L.R. 700.]

FULLY REPORTED IN 2 B.W.C.C. 109.

When a workman quits his employment for purposes

of his own, an accident befalling him is not one "arising out of and in the course of the employment".

On 23 March, 1907, one Reed, an engine-driver, was in charge of his engine and train at Landore Station.

The engine being stationary, he alighted to turn the crane for taking in water from the water column for the engine.

When on the ground, he was seen to cross the line towards an approaching goods train.

The fireman of the goods train—one Davies—handed to Reed a book unconnected with his duties, and one which Davies had promised to obtain for him.

On re-crossing the line to his engine, Reed was struck by some passing trucks, and, as a result of his injuries, died the same day.

The County Court Judge found that the death of the workman was the result of an injury caused by an accident arising out of and in the course of the employment, and awarded in favour of the widow.

The Court of Appeal and the House of Lords reversed the decision.

LORD LOREBURN, L.C.: My Lords, in this case one Reed, an engine-driver in charge of his engine, got down from it when it was at rest and crossed a siding to receive from a friend a book unconnected with his duties. On returning he was knocked down by a wagon then being shunted and killed. The only question in dispute was whether or not the accident which killed him was one "arising out of and in the course of his employment". I cannot think that it was. I agree that labour is often intermittent. If a man is in the place of his employment and during its hours uses such intervals otherwise than in working, and while doing so is injured by one of the dangers to which the employment exposes him, that may be an accident within the statute. He may be in such a case required to be in attendance and in that respect engaged on his duty, though not actually doing work. But here this man was where he was not entitled to be, and was not working, but pleasing himself. It is not that he thereby violated a rule, but that the accident did not arise out of or take place in the course of

the employment at all. It took place while for the moment he quitted his employment. No doubt allowance must be made for the habits of business, and the Act must be applied reasonably, but in this case I can see no ground for allowing compensation.

LORD MACNAGHTEN: My Lords, I am of the same opinion. I think the judgment of the Court of Appeal was right for the reasons given by the Master of the Rolls.

I agree with the Master of the Rolls in thinking that in all these cases it is incumbent upon the claimant to make out that the accident in respect of which compensation is claimed arose out of and in the course of the injured man's employment, not upon the employer to prove the contrary. But here the evidence shows that it was for a purpose of his own, and not in the execution of his duty or in the interest of his employers, that the injured man exposed himself to the risk which caused his death. He had been warned against doing the very thing which he ventured to do. He was, of course, wrong in disregarding the injunction of his employers. But it is not on the ground of misconduct that his dependants are now without remedy. At the time when the accident happened the man was about his own business, not about the business of his employers. For the moment he had put himself outside the area of protection which the legislature has carefully marked out. The case, in my opinion, is not within the scope of the enactment at all.

I think the appeal must be dismissed with costs.

LORDS ASHBOURNE and JAMES OF HEREFORD concurred.

DID THE ACCIDENT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT?—(continued).

ASTLEY *v.* RICHARD EVANS & CO., LTD. [1911].

[HOUSE OF LORDS. A.C. 674; 105 L.T. 385; 55 S.J. 687;
27 T.L.R. 557.]

FULLY REPORTED IN 4 B.W.C.C. 319.

The applicant must prove his case, but evidence short of certainty is not necessarily conjecture, and no scale

can be given whereby the necessary amount of proof can be measured and the onus discharged.

Astley, the deceased man, was a brakesman in charge of a train consisting of a locomotive and three trucks; the engine was pushing the trucks. Astley was in the end truck most remote from the engine. This train, while running, caught up a brake-van which was being drawn by an engine, and the brake-van and the truck in which was Astley ran buffer to buffer.

Astley, in attempting to climb from his truck to the brake-van, fell under the wheels and was killed. The question to be decided was—What was the motive of Astley? Was it for purposes of his own, such as to gossip with the brakesman in the brake-van, or was it to get down to work as soon as the train had passed certain points which they were approaching?

There was a step on the brake-van which there was not on the truck; this step would assist the man in jumping off for this stated purpose, as the train was slowing up.

There was also evidence that the brakesman in front had got down to attend to the points which had been last passed, and that he returned to his van, put on his coat, got his can, and proceeded to take his tea.

The County Court Judge drew the inference that Astley was preparing to carry out his duties as brakesman and that the accident arose out of the employment, and awarded for the dependant.

The Court of Appeal (Buckley, L.J., dissenting) decided that the County Court Judge was entitled to draw this inference.

The House of Lords (Lord Atkinson dissenting) affirmed the judgment of the Court of Appeal.

THE EARL OF LOREBURN, L.C.: My Lords, I agree with the majority in the Court of Appeal, though I must always hesitate in differing from the weighty opinion of Buckley, L.J.

Your Lordships have to decide whether there was any evidence upon which the learned County Court Judge might reasonably

come to the conclusion that the deceased man was trying to climb from the wagon on to the brake's van, with a view to using the step with which the van was furnished, and so alighting while the train was slowly passing the points.

It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but courts, like individuals, habitually act upon a balance of probabilities. In the present case the theory that this man climbed upon the van or tried to do so, for his own purposes, whether to gossip with the other brakesman or to amuse himself, seems to me most improbable. The theory that he meant to get upon the van because in a couple of minutes the train would be passing the points, and he had to arrange the points and would save time by alighting where the points were, and could conveniently do so by using the steps which were on the brake's van, whereas there were none on the truck, seems to me very probable. The facts, being as I have just stated, point to it, and the only matter in question being the intention of the unfortunate man, I confess that I have no real doubt that this was just what he intended. The County Court Judge so found, and in my judgment was entitled so to find.

If that be so, the award must be sustained. This man was killed from a risk, in its nature incidental to his employment while doing his master's work, though in a most careless and dangerous manner. It was indeed argued here, for the first time I rather think, that in going from the truck to the van he quitted his employment, and that he was not employed to do what he did. The answer is that he was all the time doing what he was employed to do, though in the wrong way.

LORD ROBSON: My Lords, there is no doubt that the deceased workman in this case met his death by accident while in the course of his employment, and the only question is whether there is evidence justifying the conclusion that the accident "arose out of" his employment. His work at the time was that of a brakesman.

The train upon which he was placed consisted of two parts which were running together as one train, although not coupled, and upon the other part of the train there was another brakesman, who, just before the accident, was apparently intent on his tea. The train was approaching a set of points, where it would be necessary for one or other of the two brakesmen to get down from the train and work the lever. The deceased was seen to get out of his truck in order to get into the brake's van, from and to which descent and ascent were rather easier than they were from and to his own truck. In thus changing his position he slipped, and was instantly killed.

It is contended by the appellants that in this state of the facts there is nothing to show that he was doing his master's work at the time of his death. They say that the facts are consistent with his having left his work for his own pleasure or purposes.

What precise intention he had in his mind is, of course, not now susceptible of direct proof, and the Court must look at all the circumstances to see if they give rise to a reasonable and definite inference on the matter in question.

If they give rise to conflicting inferences of equal degrees of probability, so that the choice between them is mere matter of conjecture, then the applicant has failed to prove her case. But is that shown to be the case here? On the one hand, it is said that climbing from one truck into another is not, *primâ facie*, a matter of pleasure, and was a manœuvre which, if safely performed, would have facilitated the next piece of work he had to do, or may probably have intended to do. On the other hand, the appellants say, and it is, of course, possible, that the deceased may have been getting into the brake's van merely in order to waste his time in the society of the brakesman. That, however, would have been a wrongful intention on his part, and, as such, it is not lightly to be presumed against him.

Where a workman is killed in the course of his employment while engaged in some act reasonably consistent with his master's service, I think it requires some more definite evidence than the appellants can suggest in this case in order to found the inference that he was moved by a wrongful intention.

In these circumstances I think the inference drawn by the County Court Judge was the only inference properly open to him, and that this appeal fails.

LORD GORELL and LORD ROBSON concurred.

DID THE ACCIDENT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT ?—(continued).

GA NE *v.* NORTON HILL COLLIERY COMPANY
[1909].

[COURT OF APPEAL. 2 K.B. 539; 78 L.J. (K.B.) 921; 100
L.T. 979; 25 T.L.R. 640.]

FULLY REPORTED IN 2 B.W.C.C. 42.

“ When personal injury and its cause or causes have been ascertained, the question whether such cause or causes amount to an accident within the meaning of the Act is a question of law on which the decision of the County Court Judge is not final.” LORD LINDLEY (*Fenton v. Thorley & Co.*, [1903] A.C. 443; 5 W.C.C. 9).

A collier, leaving work by a recognized route on the colliery premises, was injured by moving trucks.

The County Court Judge gave judgment in favour of the employers.

The workman appealed.

Appeal allowed.

COZENS-HARDY, M.R. : I feel myself bound to say that in point of law this accident which happened in the immediate neighbourhood of the pit's mouth, close to the screen on the colliery premises, was an accident which happened “ in the course of ” the applicant's employment—the course of his employment plainly not being limited at one end to the moment when he reaches the place where he is to do his work, or at the other end to the moment when he comes up from the pit's mouth. It must include a reasonable interval of time and of space during which the employment lasts. I do not think that I need repeat what I said in the “ collier's train case ” (*Cremins v. Guest, Keen & Nettlefolds Ltd.*, 98 L.T. Rep. 335; 1 B.W.C.C. 160; 1908, 1 K.B. 469), though I must not be taken to lend any colour to the suggestion that a workman is entitled to the protection of the Act during the whole period necessary to get to his own home from the place where he is employed. But in a case like the present it seems to me quite

impossible as a matter of law to say on these admitted facts—the accident having happened where it did and at the time it did—that it was not an accident which happened “in the course of” his employment. For these reasons I think that the learned County Court Judge—who himself expressed very great doubt as to the proper inference he ought to draw—did not draw the right inference. I think our conclusion must be that this accident did arise “in the course of” the employment as well as “out of” it, and therefore, that compensation ought to be awarded to the applicant. Unless the figures are agreed, the case will have to go back to the learned County Court Judge.

FARWELL and KENNEDY, L.JJ., concurred.

DID THE ACCIDENT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT?—(*continued*).

WALTERS *v.* STAVELEY COAL & IRON CO., LTD.
[1911].

[HOUSE OF LORDS. 105 L.T. 119; 55 S.J. 579.]

FULLY REPORTED IN 4 B.W.C.C. 303.

A mere licence does not constitute a contract of employment.

A miner, proceeding to his work by a licensed path on his employers' premises, received an injury through slipping on some steps; this path was a short cut, it was quite optional on the part of the miners to take it or not. There was no contract or obligation on their part to take it.

The judgment of the County Court Judge was in favour of the employer.

The workman appealed.

The Court of Appeal dismissed the appeal.

The House of Lords held that the accident arose neither out of nor in the course of the employment and dismissed the appeal.

THE LORD CHANCELLOR (LOREBURN): He was going to his work and used some steps on his employers' land, by his employers'

permission, as a short cut to his work, and he fell on the steps. He was then three-quarters of a mile from the place where the works were situated. The County Court Judge was quite entitled to find as he did ; I think that he could not have found otherwise. In applying this Act one has to look at the words of the Act itself, and see if the injury by the accident falls within the words of it. Did it arise out of the employment, and did it arise in the course of the employment? Other cases are only useful as illustrations of the way in which these words are applied, and I think that nothing is more fruitless than to attempt to argue by analogy from one set of facts to another set of facts. In my opinion there was no evidence in this case which would have justified the County Court Judge in finding that this accident arose in the course of the employment. The man was merely going to his employment, and was not employed to be on the steps. I also think that there was no evidence which would have justified a finding that it arose out of the employment. The passage cited from an opinion which I expressed in a previous case in this House has really no bearing on the present case, because it related to the facts of that case, and it is not unimportant to bear in mind the old maxim that what is said in the course of a judgment is said *secundum subjectam materiam*, unless, indeed, it is intended expressly to lay down a general principle of law.

LORD SHAW : There was no contract or obligation direct or indirect on his part that he should use the short cut or the steps conveniently placed there. He might reach the place of his employment in any manner he liked. It was not arising out of his employment, and not in the course of his employment, that he met with his accident. I fear to make any general proposition in these cases when I see the use which is made by ingenious and able counsel of propositions laid down in this or in some other court. I would venture, however, to say one thing, which is that analogies in matters of fact nearly always fail, and I think that it is a dangerous thing in the sphere of law to conjure out of analogies a principle or proposition arising from judicial dicta which are in any respect in conflict, or to be cited as in conflict with the clear propositions and text of a modern statute.

LORD ROBSON : It is sufficient to point out here that the right to use this particular pathway was no part of the contract of employ-

ment. It was a licence given by the employer to the men who were coming to their work, but he cannot be said to have contracted that he would always give that licence. It was revocable at any moment, and without reference to the conditions of any contract.

LORD ATKINSON concurred.

DID THE ACCIDENT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT?—(*continued*).

PIERCE *v.* THE PROVIDENT CLOTHING AND SUPPLY CO., LTD. [1911].

[COURT OF APPEAL. 1 K.B. 997; 80 L.J. (K.B.) 831; 104 L.T. 473; 55 S.J. 363; 27 T.L.R. 299.]

FULLY REPORTED IN 4 B.W.C.C. 242.

The employers are liable when a workman pursuing his employment by a permitted means of locomotion is killed by an accident on the public highway.

A collector and canvasser to an industrial company, whilst riding a bicycle in the course of his employment, was knocked down and killed by a tramcar. The fact that he used a bicycle for the purposes of his employment was known to and not forbidden by the company.

The County Court Judge found that the accident, though occurring in the course of the employment, did not arise out of it, and awarded in favour of the employers.

The dependant appealed.

Appeal allowed.

FLETCHER MOULTON, L.J.: I think that this case is concluded by the finding of the learned County Court Judge that this was a permitted mode of locomotion. It was known to and not forbidden by his employers; it was permitted although it was not directed. That being so, we can draw no distinction between that and any other permitted mode of locomotion. A man who in the course of his employment has to get about the streets may do so on foot, or in a tramcar, or in a carriage or motor-car, or on a bicycle. Each of them has its own risks, and each is free from some of the risks

which affect the others. We have not to balance these risks one against the other. So soon as it is clear that this mode of locomotion is permitted by the master, the workman in adopting it is acting within the scope of his employment.

The learned County Court Judge has found that, when the accident happened, he was engaged on his duties, and that it was known to and not forbidden by his employers that he went about his district on his bicycle. The deceased was therefore using a legitimate mode of locomotion for the purpose of his duties, and in the course of his employment he had the misfortune to be knocked down by a tramcar and killed. Did the accident arise out of his employment? In my judgment it did. I agree that it might have happened to a man who was not a canvasser and collector, but this man was by his employment specially exposed to that danger. There was no evidence that he was not an expert rider. If the County Court Judge had found that it was the first time he had gone on a bicycle, and that he had thrown himself into danger and been knocked down, there would have been plenty of room for saying that the accident did not arise out of his employment but through his own incapacity, but the learned County Court Judge has found nothing of the kind. In these circumstances I think that the deceased met his death from an accident arising out of his employment.

COZENS-HARDY, M.R., and BUCKLEY, L.J., concurred.

A QUESTION OF FACT.

SMITH *v.* GENERAL MOTOR CAB CO., LTD. [1911].

[HOUSE OF LORDS. A.C. 188; 80 L.J. (K.B.) 839; 105 L.T. 113; 55 S.J. 439; 27 T.L.R. 370.]

FULLY REPORTED IN 4 B.W.C.C. 249.

The question whether the relation of master and servant existed between the employer and the employee is one of fact.

A taxi-cab driver occasionally took for the day a cab belonging to the General Motor Cab Co., Ltd. When he did so he signed an agreement as follows: "I, the undersigned driver,

hereby declare that I have taken the cab bearing the above numbers in good condition, with full kit of tools, tariff, and police plates properly affixed, and with my badge and licence. I will be personally responsible for any violation of the police regulations."

He had to pay the owners 75 per cent of his takings.

The County Court Judge held that the relation between the company and the drivers was one of bailment and not of service, and consequently that the driver was not a workman within the meaning of section 13 of the Act.

The "workman" appealed.

The Court of Appeal and the House of Lords dismissed the appeal.

LORD ATKINSON: The respondents at the hearing contended, rightly in my opinion, that the wording of the document signed by the appellant, the absence of all control over him when once he had driven the cab out of the garage, and the casual nature of his employment, were all pieces of evidence which went to show that the relation between the parties was that of bailor and bailee, while the appellant on the other side as resolutely contended that the wearing of livery, the percentage of the earnings retained, the mode of accounting for the receipts, the deposit of his licence, and the words "dismiss" and "discharge" used in certain notices were all persuasive pieces of evidence to show that the true relation between the parties was that of master and servant. The facts relied upon by the respondents were undoubtedly evidence of a bailment of the cab, upon which the County Court Judge could properly act: those relied upon by the appellant may have been evidence, strong evidence if you will, that the driver was the respondents' servant; but, if so, the finding of the County Court Judge that the appellant was a bailee was a finding on conflicting evidence on an issue of fact. So that the appellant is driven to this position, that he must contend that had the case been tried before a judge and jury the judge would have been bound to direct the jury to find a verdict for the plaintiff, on whom the burden of proof of service lay, a contention absolutely unsustainable.

LORD SHAW: The question whether the relation of master and servant existed between the employer and the driver is one of

fact. The fact has been found in this case that no such relation did exist. That point depends on many circumstances, the scope of the employment, the form of remuneration, the scope within which the person driving the cab has power to regulate his own times and seasons, or to drive or not to drive as he wishes. These are familiar illustrations of the variety of things to be considered. I think there was ample evidence in this case to confirm the finding of the County Court Judge.

LORDS LOREBURN, HALSBURY, ASHBOURNE, and MERSEY concurred.

A QUESTION OF FACT—(*continued*).

WARNER *v.* COUCHMAN [1911].

[HOUSE OF LORDS. (1912) A.C. 35; 28 T.L.R. 58; 105 L.T. 675.]

FULLY REPORTED IN 5 B.W.C.C. 177.

The finding of a County Court Judge on questions of fact, based on evidence which he might reasonably accept as true, is unassailable.

A journeyman baker driving a cart on a cold day found his right hand had become very cold; friction of the hand failed to produce any warmth; the round he finished with difficulty. In the evening, pain developed at the wrist, and he was afterward incapacitated.

The County Court Judge found as a fact that the injury was of the nature of a frost-bite, and that assuming it was an accident it had not arisen out of the employment.

The workman appealed.

Appeal dismissed by the Court of Appeal (Fletcher Moulton, L.J., dissenting) and House of Lords.

EARL LOREBURN, L.C.: My Lords, these cases are difficult enough, and we are apt sometimes to forget that what is decided in the County Court is much more often a question of fact than a question of law; and if it is a question of fact then it is for the County Court Judge to decide it. There cannot be imagined a more difficult part of this difficult Act to determine upon than that which relates to what are injuries by accident arising out of and in the

course of a man's employment. In the present case the only question decided in the Court of Appeal was that they would not disturb the finding of the learned County Court Judge upon the question of whether this injury by accident arose out of the employment.

Now I think that Fletcher Moulton, L.J., who was in the minority in the Court of Appeal, stated the law fairly enough, or rather stated what was the point of view with which a Judge ought to approach cases of this kind. He said (1911, 1 K.B. 357; 4 B.W.C.C. 38): "It is true that when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment, or was merely a consequence of the severity of the weather, to which persons in the locality, and whether so employed or not, were equally liable. If it is the latter it does not arise out of the employment, because the man is not specially affected by the severity of the weather by reason of his employment." When I turn to what the learned County Court Judge says: It may be possible, it is indeed possible, by a process of ingenious verbal criticism to apply the same kind of canon to these words as used in the old days to be applied by special demurrer to the pleading of either the plaintiff or the defendant. In substance the learned County Court Judge seems to me to have found that in this case the man was not specially affected by the severity of the weather by reason of his employment. It is quite unnecessary to scan with minuteness every phrase which he used, but in substance I think that is what he decided. If so, I see nothing in the evidence which disentitled him to find that fact, and being so found as a fact, it is binding. I will only say this further: to be perfectly strict and accurate it is somewhat lax to speak of this statute as though it referred to an accident. I am perfectly conscious that I myself, as well as others, have fallen into that *lapsus linguæ*, but at times it may be apt to confuse one's idea of what is enacted in this particular Act of Parliament. The Act of Parliament does not speak of an "accident"; it speaks of "personal injury by accident arising out of and in the course of the employment". Therefore I shall move your Lordships to dismiss the appeal.

LORD SHAW OF DUNFERMLINE: My Lords, the findings of the learned County Court Judge are really two in number. First,

negatively, he has found that this unfortunate workman was not injured by accident arising out of his employment. Secondly, positively, he has found that being set to ordinary outdoor work he was injured by the severity of the weather. Both these findings, My Lords, are findings of fact: I do not think it is the province of a Court of Appeal to disturb such findings. I agree in the course proposed.

LORDS ATKINSON and MERSEY agreed.

Appeal dismissed.

“WORK UNDERTAKEN BY THE PRINCIPAL.”

SKATES *v.* JONES & CO. [1910].

[COURT OF APPEAL. 2 K.B. 903; 26 T.L.R. 643; 103 L.T. 409.]

FULLY REPORTED IN 3 B.W.C.C. 460.

A, B, and C determine to open a skating rink; they contract with D to erect the structure. E, employed by D, is injured.

E claims compensation from A, B, and C as “principals” within the meaning of section 4.

A, B, and C are not liable.

One Acocks, a billiard saloon-keeper, and two shopkeepers named Jones, bought an iron building, situated at Kingston-upon-Thames, for the purpose of having it removed to Tony-pandy, where they intended to use it as a skating rink.

One Howarth contracted to remove the structure to Tony-pandy.

Howarth engaged a workman named Skates upon this work.

Skates, while so employed, suffered an injury by accident, and applied to Acocks and the two others named Jones as “principals” within the meaning of section 4 for compensation under the Act.

The County Court Judge held that the case was not within section 4, and dismissed the application.

The Court of Appeal decided that the respondents were not “undertakers” of the work of removing or erecting buildings as, or part of, their trade or business; they were therefore not “principals” within the meaning of section 4.

Appeal of workman dismissed.

KENNEDY, L.J. : I have come to the conclusion, after a careful consideration of the Act itself, and of the reported cases which are relevant to the particular section, that the least objectionable interpretation of the words “work undertaken by the principal” is that which I understand to be put forward by Mr. Parsons and Mr. Allen in their valuable work upon the Act, viz. that besides that which I should call the natural sense of a contractual undertaking, these words include the performance of work which the principal may be said to “undertake” because he has adopted it as his particular trade or business. This interpretation would accord with the view taken by Lord McLaren in *Zugg v. Cunningham*, and by this Court in *Dittmar v. Wilson, Sons & Co.*, and at the same time it recognizes as correct the limitation maintained by the Court of Session in *Spiers v. Elderslie Steamship Co., Ltd.* If this view is the true view of the effect of section 4, the judgment of the learned County Court Judge in the present case is clearly right. Two shopkeepers named Jones, and the keeper of a billiard saloon named Acocks, were minded to join together in running a skating rink at Tonypany in Wales. They bought an existing iron structure at Kingston-upon-Thames and made some contract, the exact terms of which did not appear; with one Thomas Howarth, to remove the structure from Kingston to Tonypany. Skates, the applicant, was employed by and worked for Howarth on this job, and met with an accident. He claimed against the trio who speculated in the skating-rink venture.

It appears to me that the learned County Court Judge rightly held that the claim was not one which could be maintained under section 4. There was only a single contract, the one between the trio and Howarth, and the trio were not “undertakers” of the work of removing or erecting buildings as, or as part of, their trade or business. They were therefore not “principals” within the

section. The fact (if it be the fact) that they paid an ironmonger's bill and either themselves did some painting or procured it to be done does not appear to me to alter the situation. I agree that this appeal should be dismissed.

COZENS-HARDY, M.R., and FARWELL, L.J., concurred.

CASUAL LABOUR.

HILL v. BEGG [1908].

[COURT OF APPEAL. 2 K.B. 802; 77 L.J. (K.B.) 1074;
99 L.T. 104; 24 T.L.R. 711.]

FULLY REPORTED IN 1 B.W.C.C. 320.

“ Workman ” does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business. (Section 13.)

Henry Hill was a man in a small way who earned his living as a window-cleaner. He had asked Mrs. Begg to be allowed to clean her windows, and for two years, whenever the windows wanted cleaning, one of the servants would write a postcard asking him to call to clean the windows. These postcards were written at irregular intervals of about one month or six weeks. The County Court Judge held that in these circumstances there was sufficient continuity about the work to take it out of the definition of casual employment. He accordingly made an award in favour of the applicant.

Mr. Begg appealed.

Appeal allowed.

COZENS-HARDY, M.R. : The appellant is a member of the Stock Exchange, and it is of course clear that the man was not employed for the purposes of his trade or business. I think the man's employment was of a casual nature. There was no engagement that he should be employed. No complaint could have been made if any other person had been employed. It was uncertain when any person would have been employed, and indeed it is not easy to frame any definition of “employment of a casual nature” which

would not cover this case. A broad distinction is taken in the Act. If a man for the purposes of his trade or business employs another, it matters not that the employment is of a casual nature, such as, for example, that of a dock labourer, and the man so employed is a workman within the meaning of the Act, but an entirely different principle is applicable to the case of what, for the sake of distinction, I may call domestic engagements. I am not prepared to extend the burdens of the Act to householders who simply call in a man, not part of their regular establishment, to do a particular job as and when necessity arises.

On these grounds I think the learned Judge was wrong in the view which he took, and that the appeal must be allowed.

BUCKLEY, L.J. : A lady was in the habit whenever her windows required cleaning, of sending for a certain man named Hill to clean them. There was no agreement of permanent or periodic employment, but, in fact, her practice was to send for the same man whenever the work required to be done. In that which follows I am dealing with a case of practice, but not of contract. The question is whether this man was a workman employed by the lady within the Workmen's Compensation Act, 1906. In my opinion he was not. The question turns upon the following words in section 13 of the Act : " Workman does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business ". The employer referred to in the second limb of this sentence is the person giving the employment referred to in the first limb. The effect of the second limb of the sentence is that if the man be employed for the purposes of a trade or business the employer is liable to him, even though the employment be of a casual nature. In other cases, such, for instance, as domestic employment, the employer is not liable if the employment is of a casual nature. I pause here to point out that the words are not " who is casually employed " but " whose employment is of a casual nature ". I have to investigate what is the character of the employment, not what is the main tenure of the employment. Is the employment one which is in its nature casual ? To take an analogy or illustration from a different subject, say, land. The question is what is the nature or quality of the land (is it, for instance, building land or agricultural land ?) not what estate is held on that land. Suppose that a host,

when from time to time he entertains his friends at dinner, or his wife gives a reception or a dance, has been in the habit for many years of employing the same men to come in and wait at his table or assist at the reception, it may be said that their employment is regular, but the employment is of a casual nature. It depends upon the whim, or the hospitable instincts, or the social obligations of the host—whether he gives any, and how many, dinner parties or receptions, and the number of men he will want will vary with the number of his guests. In such a case the waiters may not incorrectly be said to be regularly employed in an employment of a casual nature. The employment in the present case was, I think, of a casual nature. The lady might have gone abroad for some months or might have let her house, and in either of those cases the employment would, or might have, ceased. If she remained at home there was, no doubt, a well-founded expectation of employment which would normally have resulted in employment at intervals more or less regular, but the employment remained of a casual nature. I think the Act distinctly intended that where the employment was not in a trade or business the liability of the employer should be limited to the case of servants whose employment was not casual, but stable. This employment was not of that kind, and the case is, in my opinion, not within the Act of Parliament. It results that the appeal must be allowed, and the application dismissed with costs.

KENNEDY, L.J. : Agreed.

CLAIM.

THOMPSON (PAUPER) *v.* R. W. GOULD & CO., LTD.
[1910].

[HOUSE OF LORDS. A.C. 409 ; 79 L.J. (K.B.) 905 ; 54 S.J. 599 ; 103 L.T. 81 ; 26 T.L.R. 526 ; 48 S.L.R. 685.]

FULLY REPORTED IN 3 B.W.C.C. 392.

The "claim for compensation" required by section 2, subsection 1 need not be one for a specified sum of money.

The workman Thompson had practically lost the sight of one eye through an injury at his work.

In claiming compensation he did not specify the amount.

The employer contended that this omission rendered the claim invalid. The question arose under the Act of 1897.

The County Court Judge made an award in favour of the workman.

The Court of Appeal set aside the award.

The House of Lords reversed the judgment of the Court of Appeal.

THE LORD CHANCELLOR (LOREBURN): My Lords, it has been held in the Court of Appeal that unless the amount claimed has been specified there has been no "claim for compensation". I cannot see why it should be so. There is no such provision in the Act itself—I mean in its actual terms. If a man says, as admittedly the appellant did say, "I claim compensation," why are we to conclude that he did not so claim? The reasoning for the respondents is that, unless a sum is named, the employer is deprived of an opportunity of settling the claim and so avoiding proceedings under the Act. Surely, if he wants to know he can ask the question, or he can make an offer himself. Perhaps the workman would answer, especially if he gave the notice immediately after the accident, that he cannot tell until a little time has elapsed what degree of injury he has sustained. If the Act had imposed upon a workman the duty of specifying the amount which he demanded when making the claim, it might have been thought unfortunate, because it would often make the workman ask, as a matter of prudence, for the maximum that he could possibly recover. But I forbear from speculating as to what it would have been advisable for the Act to say. It is enough that the Act does not say that the amount is to be specified, and, with all respect, we must construe it as it stands. In my opinion, therefore, this appeal succeeds. I will add that even if it were necessary to specify the amount, my present view is that the respondents waived that particular. But I should not so decide without further consideration, and the point does not arise in the view which I believe that your Lordships take of the Act itself.

LORD ATKINSON, LORD COLLINS, LORD SHAW, and LORD MERSEY concurred.

JURISDICTION OUSTED.

HORN *v.* THE LORDS COMMISSIONERS OF THE
ADMIRALTY [1910].

[COURT OF APPEAL. 80 L.J. (K.B.) 278; (1911) 1 K.B. 24;
103 L.T. 614; 27 T.L.R. 84.]

FULLY REPORTED IN 4 B.W.C.C. 1.

The effect of a scheme of compensation, certified by the Registrar of Friendly Societies under section 3 of the Workmen's Compensation Act, 1906, and agreed to by the workmen, is to oust entirely the jurisdiction of the County Court Judge as arbitrator under the Act.

The deceased workman, Horn, was employed as a tinsmith by the respondents in the Naval Ordnance Stores at Portsmouth. On 14 January, 1908, a contract had been signed by which he agreed that the provisions of a scheme, No. 116, dated 16 December, 1907, providing certain scales of compensation and certified by the Chief Registrar of Friendly Societies in accordance with the provisions of the Workmen's Compensation Act, should be substituted for the provisions of that Act. The deceased worked in the department until October, 1909, when he became too ill to continue, and on 12 December, 1909, he died, as alleged, from lead poisoning. On the case being called, counsel for the employers admitted the facts as alleged by the dependant, and he further admitted that the employers were liable to pay to the dependant compensation in accordance with the scheme. The dependant's solicitor admitted on her behalf that the scheme was duly certified, and that the deceased had signed a contract agreeing thereto. On these admissions, counsel submitted that the dependant was not entitled to any award; that the dependant was bound by the agreement signed by the deceased, and was not entitled to make any claim for compensation otherwise than under the provisions of the scheme, and the provisions of the Act applicable thereto.

The County Court Judge made an award in favour of the dependant.

The employers appealed.

Appeal allowed.

COZENS-HARDY, M.R. : In my opinion it is perfectly clear that the workman who has come into that scheme and signed that document is outside the provisions of the Act altogether, and the County Court Judge had no jurisdiction whatever to deal with any question either of liability or amount or anything else. He was not an arbitrator under the Act between the parties to this action.

FLETCHER MOULTON and FARWELL, L.JJ., concurred.

MEDICAL EXAMINATION.

MORGAN v. WILLIAM DIXON, LTD. [1911].

[HOUSE OF LORDS. W.N. 220 ; 105 L.T. 678 ; 49
S.L.R. 45 ; (1912) A.C. 74.]

FULLY REPORTED IN 5 B.W.C.C. 184.

The reasonableness of the mode and conditions of the medical examination of the workman, and as to his request for the presence of his own doctor, are questions of fact for the arbitrator, County Court Judge, or Sheriff.

The workman having claimed compensation, his employers asked him to submit to medical examination under Schedule 1 (4). He expressed his willingness to do so, but stipulated that his own medical man should be present at the examination. The employers did not agree to this, and contended that the condition imposed by the workman amounted to a refusal to submit, and asked that the right to compensation should be suspended, according to Schedule 1 (4) on the ground of this refusal. The Sheriff-Substitute suspended the compensation as asked.

The Court of Session affirmed the decision of the Sheriff-Substitute.

The workman appealed to the House of Lords.

Appeal dismissed (Lord Shaw dissenting).

THE LORD CHANCELLOR (EARL LOREBURN): My Lords, the Schedule 1 (4) of the Workman's Compensation Act confers upon the employer a right to have a workman who has given notice of an accident examined medically, and there is a duty on the part of the workman to submit himself to examination, but the statute is silent and the rules are partially, and I may say mainly, silent as to the time, the place, and the conditions of this examination. Under those circumstances, practically the common rule of law applies and imposes upon both parties the duty of acting reasonably in obeying the statute. Now it seems to me that the question whether or not one side or the other has acted reasonably in a particular case is a question of fact in that particular case. If I were an arbitrator I should say as a question of fact that in most cases—perhaps in nearly every case—it is quite reasonable on the part of the workman to desire the presence of his own doctor. That may sometimes be unreasonable, because of inconvenience or expense, or for other reasons which can be established and cannot be forecast. I should have been disposed to say if there were no special circumstances, if there were no proof of inconvenience or expense, why should not the doctor of the workman be present? I see no harm that he can do; and I can conceive that he might be very useful. But it is not the function of a Court of Law, or this House as a Court of Law to take upon itself the decision of questions of fact, which by the statute are left to the arbitrator, or to the Sheriff or County Court Judge as the case may be. It is a matter for the arbitrator who has been entrusted with the duty by law to decide, and not for me, who have not been entrusted with the duty of finding facts.

LORD ATKINSON: I further think that it cannot be held that the request to have the workman's medical man present upon all occasions can be considered as *prima facie* reasonable. On the contrary, I think having regard to the wording of the statute that the burden of proving that the request is reasonable is thrown, not upon the employer but upon the workman who makes it.

LORD GORELL concurred.

SURGICAL OPERATION.

MARSHALL v. ORIENT STEAM NAVIGATION CO.,
LTD. [1909].

[COURT OF APPEAL. 79 L.J. (K.B.) 204; (1910) 1 K.B.
79; 101 L.T. 584; 26 T.L.R. 70; 54 SOL. JO. 64.]

FULLY REPORTED IN 3 B.W.C.C. 15.

When a workman has refused to undergo operation the onus is on the employers to show that the proposed operation would have cured the disability, and that the refusal of the workman was unreasonable.

The ship's doctor, giving evidence for the employers, stated that if the seaman had submitted to an operation of lancing an inflamed finger as he had advised, the subsequent amputation of the finger would not have been necessary, and that the man would have recovered at a much earlier date.

A doctor called by the workman stated that the lancing would not have saved the finger.

The County Court Judge found (1) that the workman was unreasonable in not submitting to the operation as advised by the ship's surgeon, but (2) that it was not possible to determine whether the proposed operation would have saved the finger.

The Judge made an award in favour of the workman.

The employers appealed.

Appeal dismissed.

FLETCHER MOULTON, L.J. : When the evidence was examined, it was obvious that so far as the workman (in the case of *Tutton v. Owners of S.S. "Majestic,"* 100 L.T. Rep. 644; 2 B.W.C.C. 346; (1909) 2 K.B. 54) was concerned there was no unreasonableness in his conduct. His own doctor advised him not to have the operation performed. The evidence which persuaded the learned County Court Judge that it was unreasonable for the workman to refuse to have the operation performed was, that there was a preponderance of medical testimony that in our present state of medical science

such an operation was in fact reasonable. Now we adhered absolutely to the law as laid down in the case of *Warncken v. Richard Moreland & Son, Ltd.* (100 L.T. Rep. 12 ; 2 B.W.C.C. 350 ; (1909) 1 K.B. 184), but we decided this, that the abstract reasonableness of the operation was not the issue at all, but it was the reasonableness of the workman in refusing. Therefore, the Court had to consider his position, his knowledge, and what was put before him at the time. The Master of the Rolls in his judgment laid down the proposition in language exactly like that. In the case of *Warncken v. Richard Moreland & Son, Ltd. (ubi supra)*, the continued disability to work was not due to the accident, but was due to the workman's own unreasonableness in refusing to undergo the operation, and that is what has to be proved.

For these reasons I am of opinion that this case is completely covered by authority. *Primâ facie* the accident was the cause of the loss of the finger. If the owners could have shown that the loss of the finger was not due to the accident, but was due to the workman's unreasonableness in refusing to submit to the operation—a refusal which was found to be unreasonable—they would have succeeded, but they failed to prove that. Therefore, the award of compensation is good.

FARWELL, L.J. : Take the present case—Was the loss of the finger the consequence of the accident, or was it the consequence of blood-poisoning extending farther up the arm due to neglect or omission to lance and probe? and if the latter, then a further question arose : Was that omission due to the unreasonableness of the workman? And until that second question—which is, of course, in a case like the present, one of expert opinion and expert evidence—is answered in the affirmative, it appears to me that the third question of unreasonableness does not arise. And that gets rid of the difficulty which suggested itself to me at one time, that possibly the finding of unreasonableness might involve in itself the finding that there was the probability of recovery.

But until it is shown that the loss of the finger was due to the omission to lance or probe, it appears to me that no question of whether it was reasonable or unreasonable for the workman to submit to it arises at all, because unless it was reasonably clear that he would recover, you could hardly say that it makes any difference so far as the cause of the loss of the finger is concerned, whether

the man refuses to have the operation or not. It is not his refusal which causes the loss of his finger. It is the fact that it is not shown that the treatment would have had the particular effect which is alleged on the part of the employers it would have had. I therefore agree with the other members of the Court.

COZENS-HARDY, M.R., concurred.

ACCELERATION OF DISEASE.

YSTRADOWEN COLLIERY CO., LTD. v. GRIFFITHS
[1909].

[COURT OF APPEAL. 2 K.B. 533; 78 L.J. (K.B.) 1044;
100 L.T. 869; 25 T.L.R. 622.]

FULLY REPORTED IN 2 B.W.C.C. 357.

"Given an admitted accident, it is not the law to say that the disease which has been accelerated—still more if produced by the accident—is not a matter which comes within the four corners of the Act of Parliament."
(COZENS-HARDY, M.R., *infra*.)

On 6 December, 1907, the workman was injured by a stone falling on his knee while at work in the employers' colliery.

On 10 January, 1908, an agreement was come to between the workman and the employers, whereby they agreed to pay him the sum of 14s. 10d. per week as compensation.

On the day on which the accident occurred the weather was very cold, and the workman in his injured state took over two hours to get to his home, a distance of about a mile and a quarter. He caught a severe chill; chest trouble and pneumonia supervened, and ultimately he suffered from bronchitis and chronic asthma and was unable to work.

On 2 October, 1908, an arbitration under the Act was requested with respect to the review and termination of the weekly payments payable to the workman in accordance with a registered agreement.

On 19 March, 1909, the County Court Judge found that the workman's "condition was not the natural result of the injury," and ordered that the weekly sum of 14s. 10d. payable under the agreement should be reduced to 1d. per month,

such reduction to commence as from 22 October, 1908, the costs of and incidental to the arbitration to be paid by the workman.

The workman appealed.

Appeal allowed. Case referred to the County Court Judge for rehearing and judgment.

COZENS-HARDY, M.R. : There was admittedly an accident ; a stone fell upon the workman's knee. Liability to pay compensation in respect of the accident was not disputed by the employers, and full wages were under an agreement between the parties paid for a certain time. The workman is now admittedly unable to work ; and he is unable to work by reason, I think it is said, among other causes, of chronic bronchitis. And there is evidence which is worthy of attention—I say no more than that, because it is not a question for me to deal with—that this disease was brought about by reason of the weakened condition of the man. The state of debilitation, if I may say so, which was immediately caused by the accident, so affected the workman that he was some two or three hours in getting from the colliery to his own house on the very night of the accident. In those circumstances he contracted a chill, which in his debilitated condition has led to the consequence to which I have referred. It is not for me to say what view the learned County Court Judge may take when the case goes to him for rehearing and judgment. But I think that we are bound to give him this direction, that the test is not whether the present condition of the workman is the natural result of the injury, but he must consider the result. It may be an improbable result—I will even go so far as to say, as Lord Collins said, possibly an unnatural result—but he must consider the result. The question is whether the workman's present condition is the result of the accident in this sense, that his present condition was occasioned by the debilitated state of the workman immediately after the accident, and originated by the accident which he has met.

Given an admitted accident, it is not the law to say that the disease which has been accelerated—still more if produced by the accident—is not a matter which comes within the four corners of the Act of Parliament.

In these circumstances I think that the case must go back to the learned County Court Judge to be tried after directing himself

properly. All that we can do here is to allow the appellant the costs of this appeal. The costs of the first trial and the second will be left to be dealt with by the learned County Court Judge.

BUCKLEY, L.J. : Here the facts with which we have to deal are these : The workman sustained an injury by accident arising out of and in the course of his employment. His knee was severely injured, and thereby his vitality was reduced. He had to go home. He was taken part of the way home by some fellow-workmen, and he had to go another mile alone, and he travelled that mile evidently with great difficulty, and I suppose in great pain. He took something like a couple of hours to cover a mile or so, crawling along as best he could. He caught a very severe chill. That chill may have resulted, not merely from his exposure to the cold weather and by his vitality being diminished by the shock of the accident, but also from his exposure to the cold weather with diminished powers of locomotion, having to crawl along that distance in a reduced state of muscular activity. The chill may have resulted from the accident, and from something else which would not have existed but for the accident—that is to say he had to walk with excessive slowness in cold weather. All that, I think, is included in the words “resulting from the accident”. What the learned County Court Judge did here was to come to the conclusion that the workman’s “condition was not the natural result of the injury”. I do not think that he put the proper question to himself when he put that question. The question is not whether the workman’s condition is the natural result of the injury, but whether it is a consequence of the injury resulting in such a way as I have explained. I think, therefore, that the matter ought to go back to the learned County Court Judge for his direction.

KENNEDY, L.J., concurred.

ACCELERATION OF DISEASE—(continued).

CLOVER, CLAYTON & CO. v. HUGHES [1910].

[HOUSE OF LORDS. A.C. 242; 79 L.J. (K.B.) 470; 102 L.T. 340; 54 S.J. 375; 26 T.L.R. 359; 47 S.L.R. 885.]

FULLY REPORTED IN 3 B.W.C.C. 275.

“An accident arises out of the employment when the required exertion producing the accident is too great for

the man undertaking the work, whatever the degree of exertion or the condition of health." (LORD LOREBURN, L.C., *infra*.)

It was stated that on 9 March, 1909, the workman was assisting to make a condenser bath. Whilst engaged in tightening a nut with a spanner and pressing down upon the spanner, his left foot slipped forward and he fell backwards. He tried to recover himself, made an exclamation, and fell on his back, striking his head. He was taken aside and found to be dead.

On post-mortem examination it was found that there was a very large aneurism of the aorta. The aneurism was in such an advanced condition that, according to the finding of the County Court Judge, it might have burst while the man was asleep, and a very slight exertion or strain would have been sufficient to bring about a rupture. The County Court Judge held that there was not sufficient evidence to enable him to hold that the workman had slipped. He found that the strain put upon the workman by the exertion of tightening the nut with the spanner caused the rupture of the aneurism from which the workman died. He also stated in his judgment that there was no evidence from which to draw any exact conclusion as to the extent of strain that was being put upon the workman at the time, but it was, at all events, not more than ordinary in such work; but the evidence satisfied him that the strain was sufficient to bring about the rupture of the aneurism, having regard to the man's condition at the time, and he found as a fact that the rupture was so brought about. He therefore held that the workman died from personal injury caused by accident arising out of and in the course of the employment, and he made his award accordingly.

The Court of Appeal (*nem. dis.*) upheld the award.

The employers appealed to the House of Lords.

Before Lord Loreburn, L.C., Lord Macnaghten, Lord Atkinson, Lord Collins, and Lord Shaw.

Held (Lord Atkinson and Lord Shaw dissenting) that the County Court Judge was on the evidence entitled to so make his award.

Decision of the Court of Appeal upheld.

LORD LOREBURN, L.C. : My Lords, in this case a workman, suffering from an aneurism in so advanced a state of disease that it might have burst at any time, was tightening a nut with a spanner, when the strain, quite ordinary in this quite ordinary work, ruptured the aneurism and he died. This is a mere summary of the facts. They and the learned County Court Judge's conclusions from them are stated fully in his instructive judgment. In what I am about to say, I take the facts as he found them *in extenso* and rely upon them. He has held, and the Court of Appeal have confirmed his decision, that in these circumstances the workman's dependants are entitled to compensation. I agree. These judgments make it unnecessary, from my point of view, that I should review the authorities, which I wish loyally to follow. But in a case of such great importance in the construction of this Act, I wish to state my own view as to its meaning in the light of the weighty opinions which have been cited to us in argument.

It seems to me important that we should regard not merely the question "was this an accident or not?" but also the entire sentence at the commencement of the Act of 1906, in which the liability of the employer to make compensation is set up. It runs as follows: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act". The injury must be caused by an accident, and the accident must arise out of the employment. We are not concerned here with the course of employment. What, then, is an "accident"? It has been defined in this House as "an unlooked-for mishap or an untoward event, which is not expected or designed". All the Lords who took part in the decision of *Fenton v. Thorley* (1903, A.C. 443; 5 W.C.C. 1) agreed in substance with this definition in Lord Macnaghten's speech. I take that as conclusive. Next, the accident must be one "arising out of" the employment. There must be some relation of cause and effect between the em-

ployment and the accident, as well as between the accident and the injury. My Lords, I think some of our difficulties in applying the Act are due to this. Courts of Law have frequently been obliged to consider, especially in actions on policies of insurance, what is to be regarded as the cause of some particular event. In one sense every event is preceded by many causes. There is the *causa proxima*, the *causa causans*, the *causa sine qua non*. I will not pursue scholastic theories of causation. The "*causa proxima*" is alone considered in actions on a policy, as a general rule. I do not think that is the proper rule for cases under the section now under discussion, for the reasons explained by Lord Lindley in *Fenton v. Thorley*. It seems to me enough if it appears that the employment is one of the contributing causes without which the injury which actually followed would not have followed. And if this be so, it affords a guidance through the formidable arguments propounded by Mr. Simon on behalf of the appellants. This man died from the rupture of an aneurism, and "the death was caused by a strain, arising out of the ordinary work of the deceased, operating upon a condition of body which was such as to render the strain fatal". Again, "the aneurism was in such an advanced condition that it might have burst while the man was asleep, and very slight exertion, or strain, would have been sufficient to bring about a rupture". These are the findings and they bind us.

The first question here is whether or not the learned Judge was entitled to regard the rupture as an "accident" within the meaning of this Act. In my opinion he was so entitled. Certainly it was an "untoward event". It was not designed. It was unexpected in what seems to me the relevant sense, namely, that a sensible man who knew the nature of the work would not have expected it. I cannot agree with the argument presented to your Lordships that you are to ask whether a doctor acquainted with the man's condition would have expected it. Were that the right view, then it would not be an accident if a man, very liable to fainting fits, fell in a faint from a ladder and hurt himself. No doubt the ordinary accident is associated with something external; the bursting of a boiler; or an explosion in a mine, for example. But it may be merely from the man's own miscalculation, such as tripping and falling. Or it may be due both to internal and ex-

ternal conditions, as if a seaman were to faint in the rigging and tumble into the sea. I think it may be also something going wrong within the human frame itself, such as the straining of a muscle or the breaking of a blood-vessel. If that occurred when he was lifting a weight it would be properly described as an accident. So, I think, rupturing an aneurism when tightening a nut with a spanner may be regarded as an accident. It cannot be disputed that the fatal injury was in this case due to this accident, the rupture of the aneurism under the strain. That, of itself, does not dispose of the case. It establishes that there may have been an injury by accident caused to the workman. But it does not establish that the accident was one "arising out of the employment". It is in these words that the stress of the case mainly lies, as Mr. Simon in one passage of his argument partially indicated. When the man's condition was such that he might have died in his sleep, and the mere tightening the nut with no more strain than ordinary in such work caused the accident, can it be said that the accident was one "arising out of" the employment? That seems to me to be the crucial point. I do not think we should attach any importance to the fact that there was no strain or exertion out of the ordinary. It is found by the County Court Judge that the strain in fact caused the rupture, meaning, no doubt, that if it had not been for the strain the rupture would not have occurred when it did. If the degree of exertion beyond what is usual had to be considered in these cases, there must be some standard of exertion, varying in every trade. Nor do I think we should attach any importance to the fact that this man's health was as described. If the state of his health had to be considered, there must be some standard of health, varying, I suppose, with men of different ages. An accident arises out of the employment, when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health. It may be said, and was said, that if the Act admits of a claim in the present case, every one whose disease kills him while he is at work will be entitled to compensation. I do not think so, and for this reason. It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working. In each case the arbitrator ought to consider whether in substance, as far as he can judge on such

a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and employment taken together, looking at it broadly? Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it, or did the work he was doing help in any material way? In the present case I might have come to a different conclusion on the facts had I been arbitrator, but I am bound by the finding, if there was evidence to support it. It is found that the strain contributed to the death. There was evidence on which the learned Judge was entitled so to find, as I respectfully think; and I therefore advise your Lordships to affirm the order of the Court of Appeal.

LORD MACNAGHTEN and LORD COLLINS concurred.

MISCONDUCT OF THE WORKMAN.

POPE *v.* HILL'S PLYMOUTH COMPANY LTD.

[1911].

[HOUSE OF LORDS. 105 L.T. 678.]

FULLY REPORTED IN 5 B.W.C.C. 175.

Misconduct on the part of the workman, giving rise to an accident which causes his death, disentitles a dependant to compensation, unless the accident arose out of and in the course of the employment.

A workman employed at a colliery, while on his way home by a route across his employer's property, which he was allowed to take, endeavoured to get into a moving train of trucks, which was contrary to a regulation; he slipped and was killed. The County Court Judge gave his award for the employers.

The dependants appealed unsuccessfully to the Court of Appeal, and the House of Lords.

THE LORD CHANCELLOR (EARL LOREBURN): My Lords, the Court of Appeal decided that this accident did not arise out of the em-

ployment of the deceased man. I agree in that view. The risk which the unfortunate man ran, which ended fatally for him, was not a risk belonging to or connected with what he had to do in fulfilling his service; which is the same thing as saying that it was not incidental to his employment. It is really not a question of misconduct at all, it is simply a case in which what happened did not arise out of the man's employment at all.

LORD ATKINSON, LORD SHAW, and LORD MERSEY concurred.

MISCONDUCT OF THE WORKMAN—(continued).

WEIGHILL v. SOUTH HETTON COAL CO., LTD.
[1911].

[COURT OF APPEAL. 2 K.B. 757.]

FULLY REPORTED IN 4 B.W.C.C. 141.

Serious and wilful misconduct on the part of a workman, while acting outside the scope of his employment, causing him injury, though it result in death or serious and permanent disablement, disallows a claim to compensation.

The deceased man was a hewer in the respondents' colliery, and was at the time of the accident employed to cut a road through the coal.

He was credited with the coal that he cut down to make the road, and in order to increase the quantity of coal to his credit, he moved at intervals to a spot some seventy yards away where the road was completed, and cut coal from the finished sides.

This undermined some of the supports, causing a fall which killed him. There was a special rule against the practice of which he was thus guilty.

The County Court Judge found that, as the deceased was authorized to hew coal, as well as to help in cutting the road, the accident arose out of and in the course of the employ-

ment, although the deceased was getting the coal improperly ; he therefore awarded compensation to the dependants.

The employers appealed.

Appeal allowed.

COZENS-HARDY, M.R. : It is plain that the deceased man was, according to the finding of the learned judge, authorized to act and employed to act as a hewer on the face of the roadway which was being made in this mine. He was to work with Laws on the face of this road to get coal there and put it in tubs with a view to the coal thus hewn being taken to bank. Instead of doing that he went seventy yards farther back on the driftway where the drift had been made the full width, where it had been timbered, and there he, in direct contradiction of the statutory rules and the notices in the colliery, hewed coal at the side, with the consequence that the coal fell upon him and he was unfortunately killed. Now there is no doubt that that was serious and wilful misconduct. The learned Judge seems to think that it is enough in case of death to say that there being serious and wilful misconduct it is not really material to consider whether the act was done within the sphere of his employment or outside the sphere of his employment, and Mr. Mitchell-Innes in his very clear argument has said to us that unless we take that view we really strike out of the Act those words which in case of death or permanent disablement say that serious or wilful misconduct shall be no answer to the claim of the workman. I think that is a fallacy. Serious and wilful misconduct within the sphere of the employment does not prevent the workman's dependants from claiming compensation ; serious and wilful misconduct outside the sphere of his employment is entirely different. Serious and wilful misconduct outside the sphere of his employment does not bring within the sphere of the employment that which but for the serious and wilful misconduct would be outside of it. Any other view would be so startling as to be really, I think, almost absurd. Mr. Russell gave an illustration which I think was very apt. Suppose I employ a ploughman to plough a field, and instead of that he ploughs up my kitchen garden. Of course that was not within the sphere of his employment at all, and any accident arising from that would not render me liable even though in addition to ploughing up my kitchen garden there was

some separate and independent act of serious and wilful misconduct. In my opinion the learned Judge was wrong in the question of law which he clearly submits to us, and he ought to have held that this act was entirely outside the sphere of this man's employment, and that it is not brought within the sphere of his employment by the existence of serious and wilful misconduct.

FLETCHER MOULTON, L.J. : I entirely agree. I think the true definition of the scope of this man's employment was to hew coal at a particular face, but straining as far as I possibly could in the favour of the workman, it was at all events not wider than to hew coal at a working face. This man did not hew this coal at a working face at all ; he went and attacked the sides of the finished drift, which was in my opinion entirely outside the scope of his employment. I agree with all that the Master of the Rolls has said as to the law, and think that this appeal must be allowed.

BUCKLEY, L.J. : The learned Judge has, I think, suffered himself to confuse two things which are quite distinct: the one is whether the workman has done an act outside the sphere or scope of his employment, the other is whether in doing an act within the sphere of his employment he has been guilty of serious and wilful misconduct. If it be the latter, serious and wilful misconduct is no defence where death or serious and permanent disablement follows, but serious and wilful misconduct does not make that which is outside the sphere of the employment an act within the sphere of the employment. The question must first be answered, What was the man's employment? If when he was injured he was doing an act outside the sphere of his employment, he was no doubt guilty of misconduct, because he ought not to have done it, but that will not help him to bring it within the sphere of his employment. This man's employment did not include the hewing of coal where he was killed. When he went there he was acting outside the sphere of his employment ; he was guilty of serious and wilful misconduct in going there, but that did not bring it within the sphere of his employment. At the time that he was injured he was not within the Act of Parliament at all.

MISCONDUCT OF THE WORKMAN—(*continued*).

GEORGE v. THE GLASGOW COAL COMPANY,
LTD. [1908].

[HOUSE OF LORDS. (1909) A.C. 123; 78 L.J. (P.C.) 47;
99 L.T. 782; 46 S.L.R. 28; 25 T.L.R. 57.]

FULLY REPORTED IN 2 B.W.C.C. 125.

By the Workmen's Compensation Act, 1906, section 1, subsection 2 (c) if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed.

In the stated case asked for by the appellant (the workman, John George) the Sheriff-Substitute found that the following facts, *inter alia*, were proved:—

George expected the cage would stop at the Ell coal level without any further signal being given, and acting on this assumption he, without ascertaining whether it had stopped, opened the gate, went some three yards along the level behind a full hutch, and pushed the hutch forward to the shaft. The cage had passed the Ell coal level without stopping, and George pushed the hutch into the shaft and fell with it to the bottom. He sustained a severe scalp wound and had his right tibia and fibula fractured. The Ell coal level is a working to which rule 3 of the additional special rules under the Coal Mines Regulation Acts, 1887 to 1896, applies. George had on a previous occasion opened the gate fencing the shaft, when the cage had not stopped, and he had been warned about this a day or two prior to the accident. On these facts I found that George had not been seriously and permanently disabled in consequence of his accident, and that his injuries were attributable to his serious and wilful misconduct. I therefore assoilzied the defenders from the conclusions of the action and found them entitled to expenses.

The amount of compensation to which the applicant would be entitled is 19s. 6d. per week from 22 August, 1907.

The question of law for the opinion of the Court is :—

Is the applicant in view of the above findings barred from recovering compensation for his injury in respect that it is attributable to his serious and wilful misconduct?

On 27 May, 1908, the First Division composed of Lords McLaren, Kinnear, and Mackenzie, answered the question of law in the affirmative, and affirmed the decision of the Sheriff-Substitute as arbitrator and dismissed the appellant's case.

The workman appealed to the House of Lords. Appeal dismissed.

LORD LOREBURN, L.C. : My Lords, the only question between the parties in this appeal was whether or not what the workman did or omitted to do amounted to serious and wilful misconduct. The only point for your Lordships is whether or not there was evidence on which any reasonable man could answer, as the Sheriff here answered, the question in the affirmative. In my opinion there was such evidence, and that being so, this appeal should be dismissed ; for we cannot review the finding. I desire to add but a very few words. In my opinion it is not the province of a Court to lay down that the breach of a rule is *prima facie* evidence of serious and wilful misconduct. That is a question purely of fact to be determined by the arbitrator as such. The arbitrator must decide for himself, and ought not to be fettered by artificial presumptions of fact prescribed by a Court of law.

LORD ROBERTSON : My Lords, I concur. The scope of the present discussion is determined by the 14th section of the statute, and what we are in search of is a question of law. Unless a question of law be discovered we have no jurisdiction in the matter. Now, my Lords, that consideration imposes, I think, a certain reserve on the tribunal of appeal in discussing what is really a matter of inference from evidence, and I do not propose to dogmatize or to express any definite opinion as to the materials which the arbitrator here had before him. I shall, as your Lordship has done, add merely one or two words which I think will be found to be in harmony with the authoritative decisions on this subject, and which

may help in the subsequent consideration or administration of this Act. First of all, I entirely agree with what your Lordship has said that the composite question whether there is anywhere serious and wilful misconduct cannot be determined by any cut-and-dry rules or even rules of presumption. I do not think, however, it is rash to say, in reference to the statutory rules, that we are here considering in the first place the word "misconduct," and we have to dismiss from our minds altogether the prejudiced and inflamed meaning of the word "misconduct" which sometimes arises. The question here is not whether you call it moral misconduct. You are dealing here with the conduct of a miner, and what you are in search of is misconduct on his part in regard to his business; and I do not think it is rash to say if the rule tells him not to do something that may be *primâ facie* evidence of misconduct. It is a very different question whether it is serious and wilful misconduct. The determination whether those epithets are justified depends upon more complex considerations. In the present instance, however, my Lords, I think there are one or two considerations which are completely sufficient to vindicate the arbitrator as having been within his province in deciding that this was serious and wilful misconduct. The first is this: This man not merely must be held to have known perfectly well the rule which categorically forbade him to do what he did do, but it had been brought home to his business and bosom, because in the twenty-first finding the arbitrator has found that a day or two prior to this very accident this man had been warned in consequence of previous transgressions in this very matter. Now, my Lords, after that, I must say I think it is very difficult to say that the arbitrator had no ground on which he could legally proceed in finding that there was wilful misconduct.

The other question, as to whether it was serious misconduct, seems to me again to derive very great help from the broadest facts of this case. It was in consequence of his breach of this rule that this man was pitched down this shaft, and a rule which is directed to prevent that occurrence seems to me to be in its nature, in its subject-matter, of a serious character, and, by consequence, a breach of it to be serious. Now, my Lords, in saying that, I am not in the least traversing or going against what has been said in previous cases, because all that was said in previous cases about

the relation of the word "serious" to the consequences is that you are not to judge by the event in that particular case whether it is serious or not. I supplement that by saying that you are to judge of the question of seriousness by reference to the subject-matter if it touches life and limb.

LORD COLLINS : My Lords, I am entirely of the same opinion.

MISCONDUCT OF THE WORKMAN—(continued).

BARNES *v.* NUNNERY COLLIERY CO., LTD. [1911].

[HOUSE OF LORDS. (1912) A.C. 44.]

FULLY REPORTED IN 5 B.W.C.C. 195.

"I find it impossible to say that an accident, which results from an act done in violation of the terms of the employment, can in any proper sense be said to arise out of the employment." (LORD MERSEY, *infra*.)

By a special rule, No. 90, made in accordance with the provisions of the Coal Mines Regulation Act, 1887, workmen were forbidden to ride in the empty traction tubs in the coal mine.

Barnes, a youth aged 17, was, it was stated, aware of the prohibition; he rode in a tub, and was killed in consequence of his head coming in contact with the roof.

The County Court Judge awarded compensation to the dependant, on the ground that the workman was riding in the tub for his employers' purposes, and not for his own pleasure, and that the accident had arisen out of the employment.

The Court of Appeal (Fletcher Moulton, L.J., dissenting) decided that there was no evidence to support the finding that the accident arose out of the employment and reversed the award.

The House of Lords affirmed the decision of the Court of Appeal.

LORD MERSEY: My Lords, the question in this case is whether the injury, which caused the death of the deceased boy, arose out of his employment within the meaning of section 1 (1) of the Workman's Compensation Act, 1906. Before that question can be answered it is necessary to ascertain with accuracy the facts of the case. William Francis Barnes, a boy of 17, was employed at the Nunnery Colliery as a clamper. On the early morning of 2 May last, he and three other boys, Greaves, Bell, and Thackeray, were starting for the end of a level, known as 5 South Level, where they were to work. This place, which was some distance from the spot where they were gathered together, ought, in the proper course of work, to have been approached on foot. But there exists near to the footway an endless rope carrying tubs to the lower part of the mine. This rope was about to start. It had thirty-eight empty tubs attached to it, and was in charge of Greaves, who sat in the front tub. At the moment of starting, the other three men, of whom the deceased was one, got into the tub in which Greaves was seated in order that they might ride to their work instead of walking. The train was then started by Greaves. After it had travelled about half a mile the head of the deceased came in contact with the roof of the mine, with the result that he was killed. The other boys, who had probably travelled in this way before, avoided the danger by stooping in the tub. It appears that the deceased had not previously ridden in the tub, and that he had only been in the employment of the Colliery Company about three weeks. The evidence shows that it was quite a common practice for boys to ride in the tubs in order to get to their work, but it also appears that the use of the tubs for this purpose was forbidden, and that notices to this effect were placed in the pit bottom and in the lamp-room. There is also a special rule of the colliery—rule 90—forbidding men to use the tubs. All the boys, including the deceased, knew that they ought not to ride in the tubs, and boys, in fact, never did ride in them if any deputy or official of the colliery could see them: they then walked.

I think the judgment of the majority of the Court of Appeal was right, and that there was no evidence on which the County Court Judge could reasonably find as he did. It was no doubt part of the duty of the deceased to find his way down the mine to the place where he was to work, but it was not, in my opinion, inci-

dental to the performance of that duty that he should get into the tub. When riding in the tub he was in fact violating the conditions of his employment, and I find it impossible to say that an accident, which results from an act done in violation of the terms of the employment, can in any proper sense be said to arise out of the employment. He was not doing a permitted act carelessly, but he was doing an act which he was prohibited from doing at all.

It is true that the learned County Court Judge states in the note of his judgment, that there was no reason to assume that the boy knew of the danger he was running. This may be true : there is no evidence one way or other on the point. But it is immaterial. He knew that he was forbidden to ride in the tub, and that, in my opinion, is enough. The learned Judge also finds that the boy was not riding for his own pleasure but for the object of his employers. For my part I think he was riding for his own pleasure, but this again is immaterial and for the same reason. It is no doubt true that one object which he had in view in getting into the tub was to reach his work, but the intention existing in his mind cannot, in my opinion, convert the forbidden act into a part of his employment. It is not as if the case had been one of emergency, where the boy might have had a discretion to use the perhaps speedier, although the forbidden, means of reaching his destination. Nor is it as if the rule forbidding the act were notoriously disobeyed or not enforced. It was disobeyed, no doubt, but it was disobeyed surreptitiously and unknown to the employers. The act was, in my view, expressly prohibited, and there were no circumstances which could in any way justify the boy in disregarding the prohibition. The case falls within the authority of *Brice v. Edward Lloyd, Ltd.* (1909, 2 K.B. 804 ; 2 B.W.C.C. 26), and is governed by it. It is not like that of *Robertson v. Allen Brothers, Ltd.* (77 L.J. (K.B.) 1072 ; 1 B.W.C.C. 172). In the latter case *Cozens-Hardy, M.R.*, pointed out that the violation of the rule against the use of the skid for reaching the vessel was "winked at" by the employer, in other words, that it was not a prohibition at all.

For these reasons I think the appeal must be dismissed.

LORD ATKINSON : In these cases under the Workmen's Compensation Act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and

unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employée does the work he is employed to do may well, and in most cases would rightly, be held to be a risk incidental to the employment. Not so in the other case. For example, if a master employs a servant to carry his (the master's) letters on foot across the fields on a beaten path, or on foot by road to a neighbouring post office, and the servant, having got the letters, went to the stables, mounted his master's horse, and proceeded to ride across country to the post office, was thrown and killed: or went to his master's garage, took out his motor-car and proceeded to drive by road to the post office, came into collision with something and was killed, it could not be held, I think, according to reason or law, that the injury to the servant arose out of his employment although, in one sense, he was about to do ultimately the thing he was employed to do, namely, to bring his master's letters to the post: but in such a case the servant puts himself into a place he was not employed to be in, and had no right to be in—the back of his master's horse or the seat of his master's motor-car. He is doing a thing he was not employed to do, and had no right to attempt to do, namely, to ride his master's horse across country or to drive his motor-car. These were altogether outside the scope of his employment. He exposes himself to a risk he was not employed to expose himself to—a risk unconnected with that employment, and which neither of the parties to his contract of service could have ever reasonably contemplated as properly belonging or incidental to it. This is a case of that description. The unfortunate deceased lost his life from the new and added peril to which by his own conduct he exposed himself, not to any peril which his contract of service, directly or indirectly, involved or at all obliged him to encounter. It was not, therefore, reasonably incidental to his employ. That is the crucial test which has been many times adopted.

There was not therefore, to my mind, any evidence that the injury, the deceased received, arose out of his employment, and if the finding of the County Court Judge amounts to a finding that it did, it cannot, I think, be sustained.

EARL LOREBURN, L.C., and LORD SHAW concurred.

NEGLIGENCE OF FELLOW-WORKMEN.

LEES AND SYKES (THIRD PARTIES) *v.* DUNKERLEY BROTHERS [1910].

[HOUSE OF LORDS. (1911) A.C. 5; 80 L.J. (K.B.) 135; 103 L.T. 467; 55 S.J. 44; 48 S.L.R. 724.]

FULLY REPORTED IN 4 B.W.C.C. 115.

When a workman has been injured by an accident arising out of and in the course of his employment so that his employer becomes liable to pay compensation, and such accident has been caused by the negligence of a fellow-workman, the employer is entitled to be indemnified by such fellow-workman, he being included in the words "some person other than the employer" in section 6 of the Workmen's Compensation Act, 1906.

One Gibson was working in a factory; he was under the instructions of two other workmen named Lees and Sykes. Gibson was injured as the result of a breach, by his two fellow-workmen Lees and Sykes, of certain regulations made by the Secretary of State under section 79 of the Factory and Workshop Act, 1901. The workmen were convicted of "restarting a self-acting mule without ascertaining that no person was in the space between the fixed and traversing parts thereof" and were fined under section 85 (2) of that Act.

The employers admitted their liability to Gibson under the Workmen's Compensation Act, but claimed an indemnity under section 6 from Lees and Sykes.

The County Court Judge found that the injury to Gibson was caused "under circumstances creating a legal liability in some persons other than the employers" (section 6), and made, as against Lees and Sykes, the third parties, an award for an indemnity in favour of the employers.

The third parties appealed.

The Court of Appeal and the House of Lords dismissed the appeal, and held that a fellow-workman is a "person other

than the employer" within the meaning of the Workmen's Compensation Act, 1906, section 6.

THE LORD CHANCELLOR (LOREBURN): My Lords, I think that this appeal must be dismissed. An indemnity is payable if it comes within the following words: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof". Now here there was an "injury for which compensation was payable," and it was "caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof," at least that is so in my clear opinion. But it is said on behalf of the appellants, "No, there is no liability of one servant towards another in respect of negligence in a common employment". No authority is quoted for that strange doctrine except a dictum in one of two reports of a case which is supposed to have been uttered by Pollock, C.B.

I respectfully dissent from that opinion if Pollock, C.B., ever expressed it. We are in fact asked to extend, or rather to distort, the doctrine of *Priestley v. Fowler* (3 M. & W. 1). I have no desire to extend that doctrine; but I must point out that in that case the Court implied a term in a real contract, whereas in the present case we are asked to imply a contract where it is perfectly obvious that there is no contract at all—namely, in the relation between two fellow-servants. I can hardly imagine a more dangerous or mischievous principle than that which it is sought to set up here.

It may be right or wrong to say, as *Priestley v. Fowler* says, that a man is not to be responsible for the negligence of his agents; that is decided law, and I make no comment upon it. But it is a very different proposition to say that a man is not to be responsible for his own negligence. That would mean a free hand to everybody to neglect his duty towards his fellow-servant, and escape with impunity from all liability for damages for the consequences of his own carelessness or neglect of duty. Everyone must have an interest in maintaining the law in a sense hostile to such a proposition, and I should think that, of all classes in the community, workmen who work together in many dangerous employments have

the greatest interest of all in preventing the doctrine, which has been put forward very carefully and reasonably, from being accepted.

EARL OF HALSBURY, LORD ATKINSON, and LORD SHAW concurred.

MURDER OF WORKMAN.

NISBET *v.* RAYNE & BURN [1910].

[COURT OF APPEAL. 2 K.B. 689; 103 L.T. 178; 54 S.J. 719; 26 T.L.R. 632.]

FULLY REPORTED IN 3 B.W.C.C. 507.

The murder of a workman, in the execution of duties to his employer involving exposure to extra risk of assault and robbery, is an "accident arising out of and in the course of the employment," when it results from this extra risk.

Nisbet, the deceased man, was a cashier who was employed regularly to carry wages by train to a colliery.

On 18 March, 1910, while in the train on his journey to the colliery with the wages, he was murdered by shots from a revolver or pistol and the wages were stolen.

The County Court Judge held that the death was due to injury by accident, and that it arose out of and during the course of the employment and awarded £300 compensation to the widow.

The employers appealed.

Appeal dismissed.

COZENS-HARDY, M.R.: Any man may be struck by lightning, and in many circumstances this would not entitle him to compensation. If, however, the nature of his employment exposes him to more than the ordinary normal risk, the extra danger to which the man is exposed is something arising out of his employment. Thus a workman who was killed by lightning while working on a high scaffolding was held to have met his death by an accident arising out of, as well as in the course of, his employment. The learned County Court Judge has found that the fact that Nisbet carried the money in the bag was the reason why the robbery and the murder were

committed, and that this was a risk incidental to the employment of a man to carry money about, and that it has been so from the earliest times. In my opinion the learned County Court Judge was justified in that finding. I think the appeal fails, and must be dismissed, with costs.

KENNEDY, L.J. : Whilst the description of death by murderous violence as an "accident" cannot honestly be said to accord with the common understanding of the word—wherein is implied a negation of wilfulness and intention—I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable, that is, "any unforeseen and untoward event producing personal harm," than to exclude from the operation of this section a class of injury which it is quite unreasonable to suppose that the Legislature did not intend to include within it. If the word be so interpreted the expression "an injury by accident arising out of and in the course of the employment" includes the death of the deceased in the present case, and also the similar case suggested in the course of the argument—that is to say, the hurt or death of a gamekeeper through violence used to him by poachers whilst he is discharging the duties of his service.

FARWELL, L.J., concurred.

INJURY DUE TO "HORSE-PLAY".

FITZGERALD *v.* CLARKE & SON [1908].

[COURT OF APPEAL. 2 K.B. 796; 99 L.T. 101; 77 L.J. (K.B.) 1018.]

FULLY REPORTED IN 1 B.W.C.C. 197.

When an accident happens to a workman while engaged at his work by reason of the tortious act of a fellow-workman, which has no relation to their employment, the accident is not one "arising out of and in the course of the employment" within the meaning of section 1 of the Workmen's Compensation Act, 1906.

L, the driver of a crane, said to D, in a spirit of mischief, "sling him," meaning the workman.

D accordingly, as a practical joke, took hold of the hook of the crane and inserted it in the workman's neckcloth. Thereupon L started the crane by pulling the rope which ran down through the various floors of the warehouse, with the result that the workman was hoisted up to the top of the warehouse, 50 ft. to 60 ft. high. He held the crane chain with both hands above his head to take the weight off his neckcloth, and so prevent himself from being throttled, but as he got to the top of the building his hands went into the wheel round which the chain ran. This stopped the crane; the chain slackened out a little, the power of his hands had gone after they went into the wheel; his neckcloth came undone or gave way, and he fell, receiving such serious injuries that he was crippled for life. L and D were both subsequently tried at the Central Criminal Court for causing grievous bodily harm to the workman. They were both found guilty and bound over to come up for judgment if called upon.

In proceedings under the Workmen's Compensation Act, 1906, judgment was in favour of the employers.

The workman appealed.

Appeal dismissed.

COZENS-HARDY, M.R. : I think that this appeal fails. This Court, in the case of *Armitage v. Lancashire & Yorkshire Railway Co.* (86 L.T. 885; 4 W.C.C. 5; [1902], 2 K.B. 178) laid down what I think was a clear and intelligible proposition that where an accident happened to a workman while engaged at his work, by reason of the tortious act of a fellow-workman which had no relation to their employment, the accident did not arise out of the employment within the meaning of the Workmen's Compensation Act, 1897. It was there argued as it has been argued here that where a number of young boys are employed together at work, it is a common experience that they will, when the foreman's back is turned, occasionally engage in "larking," and it was submitted there that if two boys in the same employment got "larking" over their work, and injury was accidentally thereby occasioned to a third who was engaged upon his work, the accident must be said to arise out of and in the course of the employment. That argument was dealt with and repudiated by every member of the Court

in the year 1902. So far as I am aware that case has never been questioned or challenged in this Court or in the House of Lords. There is nothing inconsistent with the decision in the subsequent case of *Challis v. London and South-Western Railway Co.* (93 L.T. Rep. 330; 7 W.C.C. 23; [1905], 2 K.B. 154) which has been referred to, nor do I think that any inconsistency can be found with that decision. In my view, if this point is intended to be raised it must be raised elsewhere, and it is not for us to go back upon the deliberate and unanimous decision of this Court in *Armitage v. Lancashire & Yorkshire Railway Co.* (*ubi supra*). I think, therefore, that the appeal should be dismissed.

BUCKLEY and KENNEDY, L.JJ., concurred.

NO INDEMNITY TO A JOINT TORT-FEASOR.

WILLIAM CORY & SONS, LTD. *v.* WILLIAM
FRANCE, FENWICK & CO., LTD. [1910].

[COURT OF APPEAL. (1911) 1 K.B. 114; 80 L.J. (K.B.) 341; 103 L.T. 649; 11 ASP. M.C. 499; 55 S.J. 10; 27 T.L.R. 18.]

When the injuries have been caused by the joint negligence of the employer and a third party, the employer has no right to indemnity against the third party under section 6, par. 2.

A steamship was about to load coal from a staith in a navigable river. Two men in the employment of the owners of the steamship were in a boat endeavouring to take a rope from the steamship to the staith; they were injured through their boat being upset by the action of the propeller of the steamship. It appeared that the staith foreman had wrongly given an order "slow ahead, helm aport". The pilot on the steamship passed the order on to the captain, but neither of them inquired whether the propeller was clear. The second officer, though he thought there was danger, did not signal to the captain that the propeller was not clear. The engines being started, the propeller sunk the small boat.

The owners of the steamship paid compensation under the Act to the injured boatmen.

The owners of the steamship then brought an action under section 6 of the Act against the employers of the staith foreman for an indemnity.

The judge found that the staith foreman had been negligent, but that the officers of the steamship had been guilty of contributory negligence, and he gave judgment for the defendants.

The owners of the steamship appealed.

Appeal dismissed.

VAUGHAN WILLIAMS, L.J. : I do not think on the proper construction of this section of the statute, that we ought to hold that one of two joint wrong-doers has a right of action against the other wrong-doer for an indemnity.

BUCKLEY and KENNEDY, L.JJ., concurred.

BANKRUPTCY OR WINDING UP.

KING *v.* PHCENIX ASSURANCE CO. [1910].

[COURT OF APPEAL. 2 K.B. 666; 80 L.J. (K.B.) 44; 103 L.T. 53.]

FULLY REPORTED IN 3 B.W.C.C. 442.

The effect of section 5, subsection 1 is that the workman can only claim to be placed in the same position precisely as that which would exist between the employer and the insurance company.

An injured employee was paid compensation by the employers—a company—until the company was wound up.

The employee then brought proceedings against the insurance company under section 5 (1).

The insurance company alleged a breach by the employers of Clause 4 in the policy, to the effect that they had not taken reasonable precautions to prevent accidents, and had not complied with all statutory obligations. The in-

insurance company further relied on Clause 8 in the policy, which provided that any dispute must be settled by arbitration before any claim could be made upon them.

The County Court Judge stayed the proceedings to enable the applicant—the injured employee—to have the question of liability of the insurance company to be determined in manner provided by the policy.

The employee appealed.

Appeal dismissed.

COZENS-HARDY, M.R. : This is, so far as I am aware, the first case which has come before this Court under section 5 of the Workmen's Compensation Act, 1906. It raises a point which is certainly of importance, but I cannot say that it is, to my mind, a point of difficulty. It is a case in which the applicant, a girl, was employed by a company. She met with a very sad accident. The company did not dispute their liability to her. They paid compensation until proceedings were taken against them, or by them—I do not know which—with a view to a winding up. Then the girl took proceedings under section 5 of the Act of 1906, against the Phoenix Assurance Company with whom the employers had effected a policy, some portion of which policy I must refer to in a moment. . . . In fact, under the policy, if there is a dispute, the liability of the Phoenix Assurance Company is to pay, not upon a *quantum meruit*, not upon what a judge or a jury may think, but upon what, by the terms of this contract, an arbitrator shall award to be paid. That was the view taken by the learned County Court Judge who has given a very careful judgment in this case. I entirely agree with the views which he has expressed, and I think that we should be departing altogether from the true meaning of section 5 of the Act if we said that the workman was in any larger, better, or different position than the employers would have been *vis-à-vis* to the insurance company. Then it is said that this is hard upon the workman. The answer to that is that the workman only gets the benefit of section 5 upon the terms of that section. The workman has no contract with the insurance company. The workman has a right under the Statute, in the earlier part against his own employer. This is merely a supplementary special provision in the event of the insolvency or winding up of the em-

ployer. It does not lie in the workman's mouth to say, "I have my remedy against my employer, but he is in difficulties, and it is very hard that I should not have a remedy against the insurance company also," and so make the insurance company liable in an event in which they would not be liable otherwise. A person who takes the benefit of section 5 must take it with its limitations. One of them is that which I have indicated: that the workman can only claim to be placed in the same position precisely—neither more nor less, and not in any way different—to that which would exist between the employer and the insurance company. The appeal must be dismissed.

FARWELL and KENNEDY, L.JJ., concurred.

DEPENDENCY.

UNITED COLLIERIES, LTD. *v.* HENDRY [1909].

[HOUSE OF LORDS. A.C. 383; 78 L.J. (P.C.) 129; 101 L.T. 129; 53 S.J. 630; 25 T.L.R. 678; 46 S.L.R. 480.]

FULLY REPORTED IN 2 B.W.C.C. 308.

The legal personal representative of a dependant, who has died without making a claim, may properly claim all that the dependant would have been entitled to, the right being transmissible as property.

One Simpson, an unmarried man, lived with his mother, who, it was admitted, was dependent upon him for her support.

Simpson died as a result of injuries received at his work.

The mother died before making a claim as a dependant.

Mrs. Hendry, the sister of the deceased workman, brought an action against the employers, in her capacity as executrix dative of her mother, asserting that the right to claim compensation transmits to the executrix as a debt.

The Sheriff-Substitute found that the applicant could not maintain her claim.

The First Division of the Court of Session, on appeal, reversed by a majority the Sheriff-Substitute's decision.

The House of Lords affirmed the decision of the First Division of the Court of Session that the claim must be admitted in law.

LORD LOREBURN, L.C. : My Lords, the facts of this case are very simple. One Simpson, a workman in the employment of the United Collieries Company, was knocked down by a wagon while in the course of his employment on 9 July, 1907. He died of his injuries on 14 July. His mother, averred to have been dependent upon him, died on 16 October, 1907, without making any claim upon the company. Her executrix, the now respondent, made a claim on 10 December, 1907, under the Workmen's Compensation Act, as representative of the mother. The question is, can that claim be admitted in law? There are conflicting authorities prior to the decision of the First Division in this case. In Ireland the Court of Appeal decided a similar case adversely to the claim. In England the Court of Appeal expressed a different view. I think that the First Division was right in adopting the English authority, though the dissent of Lord McLaren and the judgment of the Irish Court of Appeal have naturally led your Lordships to regard the case with some anxiety. . . . I observe that in Lord McLaren's opinion if the claim is made within the statutory period, and the dependant dies before an award has been made, the right to an award of compensation has vested in the dependant, and a right to follow out the proceedings in the arbitration passes to the legal personal representatives. But if the claim has not been made, his Lordship thinks that the employer's liability is terminated by the death of the dependant. That opinion is entitled to the greatest respect, but I cannot agree. I cannot see why the claim instead of the death is to be regarded as the signal for the right to compensation vesting. And even if it were so, the Act does not require that the dependant himself should make the claim, and I do not see why that right to make the claim should not pass to the executor.

It seems to me, therefore, that as the person represented by the respondent was the only dependant, her representatives may properly claim all that she was entitled to, the right being trans-

missible as property. If there had been several dependants, the law would not be different, but the discretion of the County Court Judge or Sheriff in apportioning might very likely render the proceedings unprofitable. No doubt this Act was intended to save dependants from the loss they might sustain by being deprived of the support they previously had from the deceased workman, and if the dependants themselves die, they require it no longer. And it seems anomalous to enforce payment when no dependant is still living to require support. The Act, however, provides a fixed sum, and this must be taken as the statutory provision, whether in the event it is needed or not. Perhaps if this result had been foreseen it might have been guarded against, but that cannot affect the judgment of a Court of Law.

LORD MACNAGHTEN, LORD JAMES OF HEREFORD, and LORD SHAW concurred. LORD DUNEDIN dissented.

DEPENDENCY—(*continued*).

HOWELL v. BRADFORD & CO. [1911].

[COURT OF APPEAL. 104 L.T. 433.]

FULLY REPORTED IN 4 B.W.C.C. 203.

A receipt by a workman, in full satisfaction of all claims, does not necessarily, on his death, deprive his dependants of rights under the Act.

A receipt was given by a workman in the following terms:—

“Received this 30th day of May, 1910, from Bradford & Co. the sum of £84 12s., being in full satisfaction and liquidation of all claims under the Employers’ Liability Act, 1880, and the Common Law in respect of injuries, whether now or hereafter to become manifest, arising directly or indirectly from an accident which occurred to me on or about 2 April, 1910. The above discharge has been read over by (or to) me, and I fully understand that by electing to receive compensation under the Employers’ Liability Act, 1880, no claim can hereafter be brought under the Workmen’s Compensation Act, 1906.”

The workman died and the dependants claimed compensa-

tion, subject to a deduction of the amount paid under the settlement.

The County Court Judge made an award in favour of the dependants.

The employers appealed on the ground that the deceased workman had exercised the option conferred on him under section 1, subsection 2 (*b*).

Appeal dismissed.

COZENS-HARDY, M.R. : If we arrived at the conclusion that there had been "proceedings independently of" the Workmen's Compensation Act, 1906, I should be prepared to agree with Mr. Russell's contention. But if we arrive at the conclusion as the learned County Court Judge did, that there was a claim by the workman under the Workmen's Compensation Act, 1906, only, and that the reference to the Employers' Liability Act, 1880, was merely put into the receipt as a device to enable the employers to escape from the necessity of getting the Court to sanction an agreement for a settlement, then it has no operation at all. In the present case the workman has died, and his dependants have subsequently made a claim for compensation. It was decided by this Court in the case of *Williams v. Vauxhall Colliery Co., Ltd.* (97 L.T. 559; 9 W.C.C. 120; [1907], 2 K.B. 433) that dependants have a right of their own that arises under the Act separate and independent of that of the workman in the event of his death—a right which the workman cannot deprive them of, except in this sense, that the Act contemplates that the employer is not from first to last to be bound to pay more than the maximum compensation given by the Act, and is entitled to take credit for any sums advanced by way of weekly payments. The learned County Court Judge has treated the sum of £84 12s. which was paid by the employers to the workman, and for which the receipt was given by him, as being, notwithstanding the form of that receipt, merely a payment on account of the compensation payable to the dependants of the workman, and that it must be deducted from the amount awarded as compensation. In my opinion the learned County Court Judge has taken a perfectly right view of the case, and that therefore this appeal must be dismissed.

FLETCHER MOULTON and BUCKLEY, L.JJ., concurred.

DEPENDENCY—(*continued*).HODGSON v. OWNERS OF WEST STANLEY
COLLIERY [1910].

[HOUSE OF LORDS. A.C. 229; 79 L.J. (K.B.) 356; 102 L.T. 194; 54 S.J. 403; 26 T.L.R. 333; 47 S.L.R. 881.]

FULLY REPORTED IN 3 B.W.C.C. 260.

The Act does not say that a dependant cannot receive more than the maximum amount mentioned, but only that an employer shall not be required to pay more than the maximum in respect of one workman's death.

On the question being submitted under Clause 4, Schedule II by the committee representative of the Durham Colliery Owners' Mutual Protection Association and Durham Miners' Association to the County Court Judge, the Judge decided that Mary Hodgson, whose husband and two sons were killed in the same accident, was dependent on the husband only.

It was proved that the two sons who lived at home gave their earnings to their parents, and which with the earnings of the father formed a common fund for maintenance of the family which included six other children, and who with the mother were not earning wages.

The Court of Appeal dismissed the appeal of the widow.

The House of Lords reversed the decision of the Court of Appeal, and held that the widow was not wholly dependent on the earnings of her husband only, but was dependent on the earnings of her husband and of her two sons.

Held also that a dependant on more than one workman may be entitled to an amount of compensation greater than the maximum mentioned in Schedule I in the case of one workman.

LORD LOREBURN, L.C. : My Lords, in this appeal a widow, whose husband and two sons were killed in a colliery accident on 16 February, 1909, claimed compensation under the Workmen's Compensation Act upon the ground that she and her six surviving

children were in fact dependent upon the earnings of all the three deceased. If the fact is to be taken to be as it undeniably was, the widow and six children were so dependent; for the earnings of the three deceased, amounting to upwards of £2 a week for each of them, formed one common fund out of which the whole household was maintained. Liability in respect of the death of the husband is admitted; but two objections are raised to her receiving compensation in respect of the deaths of her two sons. The first objection is that, though there were three deaths in this accident, yet the applicant cannot recover more than the maximum provided in the schedule in respect of one workman's death. There is not a word in the Act to justify this contention. The Act does not say that a dependant cannot receive more than the maximum, but only that an employer shall not be required to pay more than the maximum in respect of one workman's death. How that can limit the employer's liability to the same sum, whether the number of deaths be one or two or three, I cannot understand. This point does not really deserve attention. I think that it was not argued in the Courts below. The second objection, when analysed, is as follows: It was argued that the mother was, in the eye of the law, wholly dependent upon her deceased husband, and being so, could not possibly be in any degree dependent upon her two deceased sons; for that would involve a logical contradiction. This supposed doctrine of law was, to begin with, presented to your Lordships as an inexorable law. Later on Mr. Mitchell-Innes so far unbent as to admit that it might be only a rebuttable presumption. But when asked if the presumption could be rebutted by conclusive proof that it was diametrically opposed to the facts as here, he would not admit that it could be so rebutted. How a rebuttable presumption could be better rebutted I really do not know. In this argument I am told that I am by law required to affirm something as the truth which everyone knows to be entirely false. The short answer is that the law requires no such thing. There are such things as legal fictions which have a peculiar history of their own, but this is not one of them. The mother was not in law wholly dependent on her deceased husband. She and her family were dependent upon those who supplied them with the means of subsistence, namely, in the present case, her husband and both of her two deceased sons. The Court of Appeal, in deciding this

case, purported to follow earlier decisions in *Senior v. Fountains* (97 L.T. Rep. 562 ; 9 W.C.C. 116 ; [1907], 2 K.B. 563) and *McLean v. Moss Bay Company* ([1909], 2 K.B. 521 ; 2 B.W.C.C. 282, overruled ; 3 B.W.C.C. 402). In the last-named case Buckley, L.J., delivered a dissenting judgment which seems to me quite unanswerable. I think that the error, if I may respectfully so designate it, arose from a misconception of the language used by Lord Halsbury, L.C., in your Lordship's House in *Main Colliery Company v. Davies* (83 L.T. Rep. 83 ; 2 W.C.C. 108 ; [1900], A.C. 358). The question there was whether a father could be said to be in part dependent upon his son's earnings where the son contributed to the family wages fund and the father received the contributions and spent them in maintaining himself and his family. The answer was obviously yes, and Lord Halsbury, referring to some argument at the Bar, said that the father was so dependent because he was helped by the son to discharge his legal duty of maintaining his family. Hence it seems to have been inferred by the Court of Appeal that the mother must be wholly dependent on the father and could not be dependent on the son's contribution. I find it difficult to follow the reasoning, all the more that Lord Halsbury expressly says in the same case that "the whole family were all dependent on the wages". It is one thing to say that in a particular case a father is partly dependent on his sons' contributions because they assist him in discharging his legal duty of maintaining his family. It is quite a different thing to say that in all cases while the father is alive the mother is dependent upon him. I do not see that the latter proposition in any way flows from the former. This Act of Parliament has its difficulties, as your Lordships are well aware. But so far as the present subject is concerned its provisions are simple enough. If a workman is killed in an accident, all who are dependent upon him (within the prescribed limits of kinship) may claim compensation from the employer. If two workmen are killed, they may claim twice, and so on, according to the number of workmen killed. The employer is protected by a statutory limit of liability in regard to each of the deaths. It is for the arbitrator or County Court Judge to ascertain, purely as a question of fact, who are dependent, and to what extent, and what they are to receive, and how the compensation is to be distributed among the dependants if there

be more than one, in accordance with the directions of the Act. There is no room that I can see for legal presumptions. Accordingly, I move your Lordships to allow this appeal, and to declare, as the evidence is all one way, that Mary Hodgson and her surviving children were dependent upon the earnings of the three deceased—Anthony Hodgson, Joseph Hodgson, and Sidney Hodgson—and that Mary Hodgson and her surviving children are entitled to receive compensation in respect of the deaths of each of the deceased persons. In regard to the directions asked for in the special case, the learned County Court Judge says that, if at liberty so to decide, he would have awarded three sums of £250, £100, and £150 respectively. I see no objection. But I must add this observation. It would be an erroneous view to hold that because the widow was only partially dependent upon the husband's earnings, therefore she cannot receive the full sum of £300 in respect of his death. Her loss by his death may be £300, though she was only partially dependent upon him. I do not say that it was so in this case; but I make this observation because he tells us that if she was wholly dependent on the father he would award £300, and if she was partially dependent on the father he would award £250. What has to be awarded in case of partial dependency is "such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or in default of agreement may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants". The sum is to be proportioned to the injury. It is for the committee to say what is reasonable and proportionate to the injury.

LORD MACNAGHTEN, LORD COLLINS, and LORD SHAW concurred.

DEPENDENCY—(continued).

NEW MONCKTON COLLIERIES, LTD. v. KEELING
[1911].

[HOUSE OF LORDS. A.C. 648; 105 L.T. 337; 27 T.L.R. 551; 55 SOL. JO. 687.]

FULLY REPORTED IN 4 B.W.C.C. 332.

The question to be decided is whether the person who is claiming as a dependant has been deprived of actual

support, or deprived of a source on which such claimant did, or would, reasonably rely for support.

One Alice Keeling was married to the deceased workman in 1881.

Seven years afterwards on account of his cruelty, it was stated, she left him, taking her children with her, and by her own exertions she maintained herself and her children.

There had been no separation agreement, and she had never made during the lifetime of her husband any application for maintenance against him.

The County Court Judge decided there had been no abandonment of her rights, and that she was entitled to compensation as a partial dependant.

The Court of Appeal affirmed this decision, holding that at any time she might have made a claim for maintenance against her husband, and was in a worse position by his death.

The employers appealed to the House of Lords.

Appeal allowed.

EARL OF LOREBURN, L.C. : It is a question of fact whether a particular person is a dependant or not. The Act was passed to provide compensation for certain people who should be damnified because the workman ceased to earn wages. If thereby they were either deprived of actual support or deprived of a source on which they did and would reasonably rely for it, they may be damnified to a degree greater or less according to the circumstances. The fact that a legal duty lay upon the workman to provide maintenance is an element to be considered, no doubt, because people usually count upon getting what they are entitled to get. But when as here, the wife had not been supported for twenty years, and in no sense relied upon the workman for any help, I think that there was no evidence of dependency. In my opinion this appeal should be allowed.

LORD ATKINSON : Alice Keeling was, in fact, at the time of her husband's death, no more dependent on his earnings than she was on the earnings of any member of the community of whom she had never heard, and from whom she had never received one farthing for her support. It may be that her husband was in law bound to

maintain her, but it is by the discharge of this obligation, not by its mere existence in law, that a husband supports and maintains his wife. It cannot in the nature of things be on the mere possession of a legal right, but rather on the effective enforcement of it in some shape or form, that a wife relies for her support. It is also, in my view, impossible to come to the conclusion that there was any reasonable probability that she would ever enforce her right against her husband, or look to the result for her subsistence to any extent. If it be asked what was the pecuniary loss sustained by Alice Keeling by reason of the cessation of her husband's power of earning, what was the money value of an obligation which there was no reasonable probability that he would ever discharge to any extent, the answer must, I think, be that it was nil; and if that be so, the award of the arbitrator in its results defeats the object and intention of the Statute. It by no means follows, however, that though there is no legal presumption that a wife is dependent upon her husband's earnings merely because of his legal obligation to maintain her, this legal obligation is to be ignored in deciding on the fact of her dependency. On the contrary the existence of the obligation, the probability that it will be discharged either voluntarily or under compulsion, the probability that the wife will ever enforce her right if the obligation be not discharged voluntarily, are all matters proper to be considered by the arbitrator in determining the question of fact, whether or not the wife, at the time of her husband's injury, looked to his earnings for her maintenance and support in whole or in part.

LORD SHAW and LORD ROBSON concurred.

DEPENDENCY—(*continued*).

ORRELL COLLIERY CO. *v.* SCHOFIELD [1909].

[HOUSE OF LORDS. A.C. 433; 78 L.J. (K.B.) 677; 100 L.T. 786; 53 S.J. 518; 25 T.L.R. 569.]

FULLY REPORTED IN 2 B.W.C.C. 294, 301.

An illegitimate child, though posthumous, may be a "dependant" within the Act.

A young girl, a cotton-mill operator, was *enceinte* by a collier who lodged at her mother's house.

The collier acknowledged the paternity and agreed to marry the girl; he caused the banns of marriage to be published, which was done on Sundays, 1 and 8 December, 1907.

The marriage was to take place on 21 December, 1907.

The collier was killed by accident at work in the mine, on 10 December, 1907.

In March, 1908, the daughter gave birth to a child.

The County Court Judge held that the child was a dependant upon the earnings of the deceased, and awarded the sum of £155 which was the present value of an annuity of £13 a year for fourteen years.

The employers appealed.

Appeal dismissed by the Court of Appeal and the House of Lords.

THE LORD CHANCELLOR (LOREBURN): My Lords, I move your Lordships that this appeal be dismissed with costs. I do not propose to add anything on the question either of illegitimate children or of posthumous children, as I agree with what has been said by the Court of Appeal on those subjects. As far as the language of the Statute is concerned with respect to the question of dependency, the real practical matter is whether assistance has been given or could reasonably have been expected from the victim of the accident. In this case there was such a reasonable anticipation that the child would have been maintained or assisted by the father.

LORD ASHBOURNE, LORD JAMES OF HEREFORD, LORD GORELL, and LORD SHAW concurred.

COZENS-HARDY, M.R. (Court of Appeal, 1909, 1 K.B. 178; 100 L.T. 104; 2 B.W.C.C. 301): The mother of the child and the deceased were engaged to be married. The deceased avowed the child to be his. He agreed to marry the mother; he paid for the banns, which had been twice published, and the date of the marriage was fixed. The child was not born until some months later. I cannot bring myself to doubt that the father did not intend the child, to use his own language, to be a chance child. He

intended to make the child legitimate, and, whatever happened, he intended to take upon himself the responsibility for the maintenance of the child. In that sense the child was a member of the family of the deceased, and was dependent on the earnings of the deceased. For these reasons I think it is impossible to disagree with the conclusion of the County Court Judge, and that this appeal must be dismissed with costs.

MOULTON and FARWELL, L.JJ., concurred.

DEPENDENCY—(*continued*).

TAMWORTH COLLIERY CO., LTD. *v.* HALL [1911].

[HOUSE OF LORDS. A.C. 665; 105 L.T. 449; 55 S.J. 615].

FULLY REPORTED IN 4 B.W.C.C. 313.

In estimating the extent of dependency, the arbitrator may take into account the pecuniary value of all services which were being rendered by the deceased to the dependant.

An infant workman earned 6s. 11d. per week, which he paid to his father; his services to his father, who was a barber, were valued at 6s. a week; the son was killed in the course of his work at the colliery.

The County Court Judge held that the father was not a dependant or partial dependant, as the sum of 6s. 11d. was not more than sufficient to maintain the deceased. The Judge disregarded the value of the services of the boy to his father. The Court of Appeal and the House of Lords remitted the case to the County Court Judge for rehearing and judgment.

LORD LOREBURN, L.C. : There is no rule of law that I know of to prevent the County Court Judge from looking at the whole of the facts; there is no rule of law to say that he must so marshal the receipts and the outgoings as to set off the whole of the maintenance against the earnings and so to negative the fact of dependency. He may say, if he thinks right and thinks it is the truth, that though the earnings were 6s. 11d. and the maintenance

6s. 11d., yet in return for the maintenance, the deceased rendered services of value, so that the earnings were a clear gain, and that the applicant was dependent upon the earnings to the full extent or to any qualified extent. The proper course is to look at all the circumstances and to say to what extent, if at all, the father was dependent upon his son's earnings. Accordingly, I cannot agree with the form of the order made by the Court of Appeal, but I agree that the case ought to be remitted to the County Court Judge simply that he may hear and decide it; and I think he ought to understand from this House that, in determining the question of the dependency of the father on the earnings of the son, he is not precluded by law from making a deduction in respect of the cost of maintenance, nor from taking into account, as against the cost of the son's maintenance, the pecuniary value, if any, of the services rendered by the son to the father in the conduct of the latter's business as a barber. The case should go back to the County Court Judge to be dealt with on the principles indicated.

LORD ATKINSON, LORD GORELL, and LORD ROBSON concurred.

CONCURRENT CONTRACTS OF SERVICE.

S.S. "RAPHAEL" (OWNERS OF) *v.* BRANDY [1911].

[HOUSE OF LORDS. A.C. 413; 55 S.J. 579; 27 T.L.R. 497.]

FULLY REPORTED IN 4 B.W.C.C. 307.

The Crown may be an employer under the Act so as to give rise to a concurrent contract of service within Schedule I, 2 (b).

One Brandy, a stoker employed on board a merchant steamship, was also enrolled as a stoker of the Royal Naval Reserve for which he received £6 a year as a retainer; he met with an accident on the merchant steamship, and claimed that his retaining fee in the Naval Reserve should be taken into account under Schedule I, par. 2 (b).

Brandy met with an accident on board the S.S. "Raphael" which resulted in the amputation of two fingers. This dis-

abled him from continuing to serve in the Naval Reserve. He lost the retaining fee of £6 and he claimed, as against the shipowners, that half the amount he received as a member of the Naval Reserve, which was calculated to be 1s. 2d. per week, should be added to half his weekly earnings from the shipowners.

The County Court Judge said this contention was correct and made an award in his favour.

The Court of Appeal and House of Lords dismissed the appeal of the employers.

LORD CHANCELLOR (LOREBURN): I agree with Fletcher Moulton, L.J., that this is almost a typical case of concurrent contracts, because the claimant was being paid wages for his services on board a merchant ship, and at the same time he was earning about £6 a year by virtue of his engagement with the Crown, and he was giving an equivalent for it, because he was keeping himself fit for doing the work which he had stipulated to do. With regard to the contention that the Crown was not an employer, that is only another way of putting the point, which I think cannot be sustained on the construction of section 9 of the Act. It is manifest that the Act contemplated that the Crown might be an employer, and it was, I think, so intended in the schedule to the Act.

LORD SHAW: In calculating the scale of compensation to be paid to the respondent, it appears to me a sound construction of the Act to include the £6 allowance, and I think that the judgment of the Master of the Rolls and Fletcher Moulton, L.J., was sound.

LORD ATKINSON and LORD ROBSON concurred.

PREVIOUS PAYMENTS.

MCDERMOTT *v.* S.S. "TINTORETTO" (OWNERS OF)
[1910].

[HOUSE OF LORDS. (1911) A.C. 35; 80 L.J. (K.B.) 161;
103 L.T. 769; 11 ASP. M.C. 515; 55 S.J. 124; 27
T.L.R. 149.]

FULLY REPORTED IN 4 B.W.C.C. 123.

*Payments or benefits under the Merchant Shipping Acts
are not payments or benefits to which regard shall be*

had under Schedule I, par. 3, Workmen's Compensation Act, 1906.

On 21 December, 1908, one McDermott, a seaman on board the S.S. "Tintoretto," broke his thigh by an accident.

On 29 December, 1908, he was discharged and placed in hospital in New York.

On 11 March, 1909, he arrived in England still incapable of work.

The wages from 21 December till 29 December, and the subsequent medical and surgical expenses and maintenance in hospital in New York, had been paid by the employers in accordance with their obligations under the Merchant Shipping Acts.

The employers admitted their liability to pay compensation to McDermott, under the Workmen's Compensation Act, from 11 March, 1909, the date he arrived in England (section 7 (1) (e)), but they contended that regard should be had to the eight days' wages paid between 21 and 29 December, and that some, if only a nominal, reduction should be made in accordance with Schedule I (3).

The County Court Judge held that he was not bound to have regard to such payment.

The Court of Appeal (Kennedy, L.J., dissenting) reversed this decision.

The seaman appealed *in formâ pauperis* to the House of Lords. Appeal allowed.

LORD LOREBURN, L.C. : When a seaman meets with an accident at sea which disables him, he must be paid his wages till he reaches a port where he can be discharged. Further, if he is discharged at a foreign port, the owners must maintain him and furnish him with medical aid till he is able to travel and reaches a port in this country. That is under the Merchant Shipping Acts. Then the Workmen's Compensation Act, 1906, takes up the tale. Before 1906 the seaman was not within the Act. In 1906 the right to compensation for accidental injury was extended to seamen, and begins when the injured seaman ceases to be entitled to maintenance. It is clear that compensation is to begin exactly where the right to maintenance ends. Reading the words of the Act which we have

to construe in the light of what I have just read, I have no difficulty in seeing where their generality is limited. It is not every payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity that the County Court Judge must have regard to. It is only such as are received in respect of the incapacity, and received in respect of that period of it which is covered by the compensation. It means, in short, that the man is not to be paid twice over, by the overlapping of benefits derived from two separate Acts of Parliament. I feel no hesitation in reading such words into the statute. The same thing has been done by this House before, notably in interpreting the Succession Duty Act in order to avoid a plain absurdity. In this case it is necessary, in order to avoid a plain frustration of the obvious intention of the Legislature.

LORD SHAW: In ordinary circumstances the compensation to an injured workman runs from the date of the injury, but with regard to the special case of seamen, as the employers were under the obligations above mentioned, which subsist till the date of the seaman's being landed in a home port, it is provided that the weekly payment under the Workmen's Compensation Act shall not begin to run in the seaman's case until after that date. Clashing or overlapping of the remedial provisions of the two Acts is thus avoided. Up till the date of landing, the employer must discharge the debts due under the Merchant Shipping Acts; and only for the period subsequent to that date does workmen's compensation run.

In my opinion the expression "payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity," Schedule I, par. 3, does not cover the discharge or settlement of a debt due to the workman by his employer.

THE EARL OF HALSBURY and LORD ATKINSON concurred.

PERQUISITES.

SKAILES *v.* BLUE ANCHOR LINE, LTD. [1910].

[COURT OF APPEAL. 80 L.J. (K.B.) 442; (1911) 1 K.B. 360; 103 L.T. 741; 55 S.J. 107; 27 T.L.R. 119.]

FULLY REPORTED IN 4 B.W.C.C. 16.

In estimating the rate of remuneration, all perquisites must be taken into consideration.

Skailes, a ship's steward, was drowned at sea.

The facts, from the Judge's notes, were as follows :—

The deceased had £8 per month salary ; he also received 5 per cent commission on sales at the bar, which brought him in about £70 a year. It was further estimated that his board was worth about 2s. a day, and he received in addition a bonus of £2 a month on the happening of certain events, which, in fact, did happen. The owners also supplied deceased with bottles of whisky at 4s. each, which he resold to the passengers at 6d. a glass, and, as it was estimated that there were fifteen " nips " in each bottle, the deceased made a profit of 3s. 6d. on each bottle he sold.

The employers denied liability on the ground that the deceased was excluded from the benefits of the Act, in that being employed otherwise than by way of manual labour, his remuneration exceeded £250 a year (section 13).

The County Court Judge declined to take into consideration the conditional payment of a bonus and the profits on the sale of whisky, and found, as a fact, that deceased earned £232 a year, and awarded the dependant £300 and costs.

Employers appealed.

Appeal allowed.

FARWELL, L.J. : I agree with the judgment of the Master of the Rolls and not that of Fletcher Moulton, L.J. In my opinion the appellants are right on both points. The whole scheme of compensation provided by the Act is based on earnings, and it is only reasonable to suppose that when a man is excluded from the operation of the Act on account of the magnitude of his " remuneration," this word should be used as " earnings ". I am confirmed in this view by the words of Schedule I, par. 2 (a) : " Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated," and by the opinion of Fletcher Moulton, L.J., in *Dothie v. Robert Macandrew & Co.* (1908, 1 K.B. 803 ; 98 L.T. Rep. 495 ; 1 B.W.C.C. 308), where he said : " Under the Act no person not employed in manual labour is a ' workman ' within the meaning of the Act, if he receives a remuneration exceeding £250 a year. If he receives less than that,

then he is entitled in cases of accident coming within the purview of the Act to compensation based on the remuneration which he was actually receiving. The same word is used in the Act in both cases, and in my opinion the Court is bound to give exactly the same meaning to the word 'remuneration' when it is estimating compensation as when it is deciding whether a person is a 'workman' within the meaning of the Act." Treating "remuneration" then as synonymous with earnings, I cannot doubt the so-called bonus must be taken into account. As to the other point. It is impossible to check the amount received in respect of whisky sold in "nips" and not by the bottle; consequently the employers expressly allowed the steward to keep as his perquisites anything that was realized over and above the cost price of the bottle, and by reason thereof paid him less wages. I see nothing wrong or irregular in this. The County Court Judge has refused to take these perquisites into consideration because there is no evidence of the amount sold in nips. As the S.S. "Waratah" was lost with all hands, there is, of course, no evidence that any whisky at all was sold; but the Legislature, foreseeing the difficulty of ascertaining the amount of earnings in accordance with the strict rules of evidence, have provided that average weekly earnings shall be computed in such manner as is best calculated to give the rate per week (Schedule I, par. 2 (a)), and accordingly in the case with reference to tips (*Penn v. Spiers and Pond*, 1908, 1 K.B. 766; 98 L.T. Rep. 541; 1 B.W.C.C. 401) this Court directed the County Court Judge to estimate the amount of a deceased waiter's tips as best he could, and the same direction must be given here.

COZENS-HARDY, M.R., concurred, FLETCHER MOULTON, L.J., dissenting.

Case referred to the County Court Judge for his estimation of these extra payments and for judgment.

COMPUTATION OF EARNINGS.

ANSLOW *v.* CANNOCK CHASE COLLIERY CO.
[1909].

[HOUSE OF LORDS. A.C. 435; 78 L.J. (K.B.) 679; 100 L.T. 786; 53 S.J. 519; 25 T.L.R. 570.]

FULLY REPORTED IN 2 B.W.C.C. 365.

During the twelve months previous to an accident to a miner, the colliery had been working thirty-six

weeks, the miner had worked thirty-three weeks, being away ill for two weeks and one week on holiday. He had earned in all £68.

His average weekly earnings are represented by the fraction $\frac{36}{52}$ of $\frac{68}{33}$.

The County Court Judge found, first, that an ordinary full working week for a miner in the district in which the appellant was employed (namely, the Cannock Chase district) consists of $5\frac{3}{4}$ working days, that during the twelve months preceding the accident the appellant worked on $192\frac{1}{4}$ days, which at $5\frac{3}{4}$ days to the week was equivalent to thirty-three ordinary full working weeks, that the total wages earned and received by the appellant for such work (exclusive of the value of his coal allowance) amounted to £68 4s. 9d.; secondly, that there were fourteen weeks of stoppage when he could not get work, two weeks for bank holidays and wakes when he did not work, two weeks when he was away from illness, and one week when he took a holiday, leaving thirty-three weeks during which he actually worked; thirdly, that the fourteen weeks of stoppage and the two weeks of bank holidays and wakes were normal and recognized incidents of the appellant's work, and not due to abnormal or fortuitous circumstances, such as a fire in the mine.

The word "weeks" was used by the County Court Judge as meaning an aggregate of days amounting to weeks, reckoned at the agreed rate of $5\frac{3}{4}$ days per week. The County Court Judge then divided this £68 by thirty-three weeks, and made a further fractional deduction in accordance with the suggestion in the judgment of Moulton, L.J., in *Bailey v. Kenworthy* (98 L.T. 327; (1908) 1 K.B. 441; 1 B.W.C.C. 351) so as to arrive at the true average for the working year.

By this he found that the appellant's average weekly earnings were 28s. 8d., and he awarded a weekly payment of 14s. 4d., to which half the coal allowance or 1s. a week was added, making 15s. 4d. in all.

The workman appealed on the ground that the average

weekly earnings should not be qualified and reduced by the fraction $\frac{2}{5}\frac{6}{2}$ which represents the weeks in the year in which the colliery was working.

Appeal dismissed by the Court of Appeal and the House of Lords.

[Court of Appeal.] COZENS-HARDY, M.R. : This appeal raises the question how the "average weekly earnings" of a collier during the twelve months before the accident, liability for which is admitted, ought to be calculated. He was in the employment of the respondents during the whole period of twelve months, and was entitled to an allowance for coal whether actually working or not. I accept, as I am bound to do, the following findings of the learned County Court Judge. (His Lordship stated them as above set forth, and continued.) I have used the phrase "weeks" as the County Court Judge does, as meaning an aggregate of days amounting to weeks reckoned at the agreed rate of $5\frac{3}{4}$ days per week. Now the dominant principle which ought to be applied is stated in Schedule I, section 2 (a) : "Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated". In my opinion the true test is this : What were his earnings in a normal week, regard being had to the known and recognized incidents of the employment? If work is discontinuous, that is an element which cannot be overlooked. For example, if the normal days of work are four days a week, for which 20s. are paid, it is a fallacy to say that the average weekly earnings are 30s. That is not the rate per week at which he was being remunerated. To say that he got 5s. a day for every day during which he worked does not involve the proposition that he got 5s. for every day in the week. Such a proposition has no warrant in fact, and I decline to accept it. I think that days in which no work was done must be disregarded for the purposes of the division of the total wages earned. That reduces the fifty-two weeks to thirty-three in the case now before us. But the sum arrived at by the fraction $\frac{6}{3}\frac{8}{3}$ does not represent his earnings in a normal week, or his average earnings during the whole twelve months. It represents only the average during a portion of the year—namely, during the thirty-six weeks when the colliery was working. In other words, the true result is represented by the

fraction $\frac{36}{32}$ of $\frac{68}{33}$. This is the method adopted by the learned County Court Judge. It must not be forgotten that compensation as distinguished from damages is what the Act gives; and that compensation must be measured according to the provisions of the Act (*Anslow v. Cannock Chase Colliery Co., Ltd.*, Court of Appeal [1909], I.K.B. 352; 2 B.W.C.C. 363).

[House of Lords.] LORD LOREBURN, L.C. : My Lords, in this case I agree with the conclusion arrived at by the Court of Appeal and by the learned County Court Judge in his extremely careful and able judgment. The question is in regard to the way in which the average weekly earnings of a workman shall be computed, in a case in which a normal and recognized incident of his work was fourteen weeks' stoppage, and two weeks of general holidays during the year.

The object of the Act broadly stated is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident. If he takes a holiday and forfeits his wages for a month, then that does not interfere with what he can earn. It is only that for a month he did not choose to earn. So, too, if there be a casualty accidentally stopping the work. But if it is part of the employment to stop for a month in each year, then he cannot earn wages in that time in that employment, and his capacity to earn is less over the year.

I agree with what the learned Master of the Rolls says in his judgment when he uses the following language: "In my opinion the true test is this. What were his earnings in a normal week, regard being had to the known and recognized incidents of the employment? If work is discontinuous, that is an element which cannot be overlooked."

I therefore move your Lordships that the appeal be dismissed with costs.

LORD ASHBOURNE, LORD GORELL, and LORD SHAW OF DUNFERMLINE concurred.

PROSPECTIVE AWARD.

BAKER *v.* JEWELL [1910].[COURT OF APPEAL. 2 K.B. 673; 79 L.J. (K.B.) 1092;
103 L.T. 173.]

FULLY REPORTED IN 3 B.W.C.C. 503.

It is not competent for a County Court Judge, acting as arbitrator under the Workmen's Compensation Act, 1906, to make a prospective award.

The County Court Judge, acting on the report of a medical referee that the workman would be able to do his work in some three months' time, made an award for 8s. a week from 25 March to 26 July, 1910, and a penny a week after that date. From that decision the workman appealed, on the ground that the Judge was not entitled to make a prospective award.

Appeal allowed.

COZENS-HARDY, M.R. : This is, in my view, an important point. I am not sure whether it has ever arisen before for decision in this country, although it has in Scotland. The point really is this : whether it is competent for a County Court Judge, acting as arbitrator under the Workmen's Compensation Act, 1906, to make a prospective award. That is to say, whether it is competent for him to declare that he awards so much for the next ten weeks and then he awards a penny a week, or whatever it may be. In my opinion such an award is not within the power of a County Court Judge. It has two defects, and it has two results. One is that the learned County Court Judge is taking upon himself the function of a prophet, which is not what he ought to be. The other is this, which, to my mind, is a more serious objection : It shifts the onus of proof in a mode which is, or which may be, very unfair to the workman. The duty of the arbitrator is to say what, upon the evidence adduced before him at the time of the hearing, is the condition of the workman, and on that footing he ought to make an award of so much per week during the incapacity of the workman.

Then, if there is a change, and if the workman is getting better, it is for the employer to seek to review on the ground that the incapacity has ceased or determined, or whatever it may be. The burden is upon the employer to show that there is a change of circumstances. If, however, the award is made in the manner in which it has been made in the present case—namely so much a week for a certain time, and then only a penny a week afterwards—and if the workman's condition should, at the end of the first period, be substantially the same as before, the burden is thrown upon the workman, and not upon the employer, and the workman then would have to get the award reviewed.

I think, therefore, that this appeal succeeds, and that the appellant, the workman, must have the costs of the appeal. The case must go back to the learned County Court Judge to make a new award, the respondents, the employers, undertaking without prejudice to any question to continue the payment of 8s. a week up to 26 July, 1910 (Court of Appeal hearing, 11 July, 1910).

FARWELL and KENNEDY, L.JJ., concurred.

NO SET OFF.

B. HOSEGOOD AND SONS *v.* WILSON [1910].

[COURT OF APPEAL. 80 L.J. (K.B.) 519; (1911) 1 K.B. 30; 103 L.T. 616; 27 T.L.R. 88.]

FULLY REPORTED IN 4 B.W.C.C. 30.

When the amount of compensation is ordered to be reduced as from a date antecedent to that of the order, any amount overpaid by the employer cannot be treated by him as payment in advance of future reduced weekly payments.

An employer in June, 1910, on an application to review, obtained an order that the amount payable by him as compensation should be reduced as from the preceding February. He claimed that he was entitled to treat the amount overpaid between February and June as a payment on account of the reduced compensation ordered to be paid in the future, and

accordingly declined to pay anything until that surplus was worked off.

The workman then applied to issue execution.

The County Court Judge held that the employer was not entitled to refuse to pay compensation on these grounds.

The employer appealed.

Appeal dismissed.

COZENS-HARDY, M.R. : I think that the learned Judge was quite right in the view he took, that although the employer may have a right, and I imagine has a right, to recover from the workman the excess between 14s. 7d. and 10s. a week from February up to the date of the order, that is really a separate cause of action, and it cannot be regarded as in any way a payment in advance of any future payments. Of course, it was not in respect of those future payments. It was only a payment in respect of the then existing obligation to pay the 14s. 7d. a week pursuant to the agreement. In my opinion the learned Judge was quite right, and the appeal must be dismissed with costs.

FARWELL, L.J. : The most plausible way of putting the appellants' case appears to me to be to say, as Mr. Ellis Hill says, that the Act gives compensation, and that the amount of that compensation is settled, or may be varied from time to time, but it is the same compensation. The difficulty which is in his way, and which seems to me insuperable, is that the amount of the weekly payments so settled cannot, under par. 19 of Schedule I in any way be either assigned, charged, or attached. That, to my mind, necessarily must include anticipation, because if it were paid to another person it would be an assignment ; if it is to the employer himself it is in effect, if it is anything at all, an assignment of the amount that is coming to him.

FLETCHER MOULTON, L.J., concurred.

PROBABLE EARNINGS.

VICKERS, SONS & MAXIM, LTD. v. EVANS [1910].

[HOUSE OF LORDS. A.C. 444; 103 L.T. 292; 26 T.L.R. 548; 48 S.L.R. 697.]

FULLY REPORTED IN 3 B.W.C.C. 405.

The words in Schedule I, section 16, do not limit the inquiry, as to the estimation of the probable earnings, to the particular trade in which the workman was injured.

Evans, a minor, when employment was scarce in his trade as a stove-grate fitter, took temporary work as a labourer with Messrs. Vickers, Sons & Maxim, Ltd.; he sustained an accident and was paid 11s. 4d. half wages, which subsequently were reduced to 1d. a week. Twelve months after the injury, having reached twenty-one years of age, he applied under Schedule I (16) for an increase in compensation, on the ground that he would have been earning more had he not been injured.

The County Court Judge found that if he had remained uninjured he "would probably have been earning" as a stove-grate fitter 30s. a week, and he made an award that the 1d. a week should be increased to 7s. 6d. a week.

The employers appealed.

The Court of Appeal and the House of Lords dismissed the appeal.

LORD CHANCELLOR (LOREBURN): My Lords, this appeal may serve to remind us of a truth which is sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say; and I agree with the conclusion which has been arrived at by the Court of Appeal. The standard by which the weekly payments are to be measured

in the Act is, generally speaking, the average weekly earnings during the period of the workman's actual employment under the same employer ; but in the case of a minor, clause 16 of Schedule I makes special provision for a review of the weekly payment ; it says that the arbitrator may increase it "to any amount not exceeding 50 per cent of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured". Now does that mean, as the appellants contend, what he would probably have been earning in his actual employment under the same master, or may you consider other possible employment? The appellants' contention involves reading words into this clause. The clause does not contain them ; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. The question is, What would the workman probably have been earning? Those are the only provisions in the Act, and I think that the conclusion arrived at by the Court of Appeal is perfectly sound.

LORD MACNAGHTEN : My Lords, I agree. I do not see any reason for departing from or qualifying the plain words of the section, and I think that the evidence on which the learned County Court Judge seems to have relied was properly admitted. There are no doubt many employments such, for instance, as employment in a colliery in which, as has been pointed out, boys follow the calling of their fathers, looking forward to a regular increase of earnings as they become more and more capable of doing a man's work. In such a case as that, there is no difficulty in estimating the probable amount of earnings which the workman if uninjured would have been able to gain. On the other hand, there are employments in which boys are engaged simply because they are boys and not men, in which there is no prospect of advancement or employment when they grow up to man's estate. When they cease to be boys they are discharged, to find their livelihood as best they can. In such a case the method which the Statute has adopted seems to be the only method practicable. Within a fixed limit the Statute leaves the question quite at large, trusting to the discretion and good sense of the County Court Judge. No doubt the task committed to him is somewhat difficult ; but the Judge has been trusted, and I think properly trusted, to deal with each case reason-

ably without any fear of his making an extravagant or immoderate estimate of the workman's earning capacity.

LORD JAMES OF HEREFORD and LORD COLLINS concurred.

SUSPENSORY AWARD.

BIRMINGHAM CABINET MANUFACTURING CO. v. DUDLEY [1910].

[COURT OF APPEAL. 102 L.T. 619.]

FULLY REPORTED IN 3 B.W.C.C. 169.

"The effect of an order for 1d. a week, is simply to keep alive the right to obtain compensation, in an event which, at the least, may be called possible, and may be called probable." (COZENS-HARDY, M.R. : Birmingham Cabinet Manufacturing Co. v. Dudley, 1910 ; 3 B.W.C.C. 169.)

On 20 November, 1907, one Dudley received an injury through accident at his work, whereby the ends of two of the fingers of his left hand were cut off.

On 3 February, 1908, Dudley accepted an offer to return to his work at the same rate of wages, and on 9 April, 1908, an agreement was made by which the compensation was reduced to 1d. per week.

In 1909 the employers applied to terminate the payment of 1d. a week.

The County Court Judge held that, as the workman was earning as good wages as before the accident, the payment of 1d. compensation must cease, and he declined to make a declaration of liability.

The workman appealed.

The Court of Appeal referred the case to the County Court Judge for a re-hearing.

BUCKLEY, L.J. : Where incapacity to work has ceased, and the wage-earning capacity of the workman is as good as before, the

Court cannot give him 1d. per week. If an agreement to pay compensation is terminated, then the compensation must cease also. The proposition that if a workman's earning capacity is as good on a review as it was before the accident, that then an agreement to pay compensation of 1d. a week must be terminated, is one that may be open to be argued before the House of Lords : but it cannot be argued in this Court, because this Court has held that though a workman's employers are paying him the same wages as he received before the accident, the County Court Judge may make a merely nominal order for 1d. a week, to keep alive the power to order compensation in the future, if his wage-earning capacity is diminished. On this point, we in this Court are bound by the authorities. In the present case, the question which the learned County Court Judge ought to have asked himself was this : Was the workman, having regard to what has happened, left in such a position that in the open labour market his earning capacity might in the future be less than it was before the accident as the result of the accident ? The question is not whether his employers are paying him the same wages as he received before the accident. In my opinion the learned County Court Judge addressed his mind to the wrong question. On that ground I think that the matter ought to go back to him to be re-heard.

COZENS-HARDY, M.R., and FLETCHER MOULTON, L.J., concurred.

TERMINATION OF WEEKLY PAYMENT.

NICHOLSON *v.* PIPER [1907].

[HOUSE OF LORDS. A.C. 215 ; 76 L.J. (K.B.) 856 ; 97 L.T. 119 ; 23 T.L.R. 620 ; 51 SOL. Jo. 569 ; 45 S.L.R. 620.]

FULLY REPORTED IN 9 W.C.C. 128.

When the award, on an application for review, terminates the weekly payments, it is final, and no second application for review can be entertained.

The employer, in September, 1905, made an application for the review and termination of a weekly payment.

The County Court Judge made an order as follows :—

“ Having duly considered the matters submitted to me, I do hereby make my award as follows : I order that the agreement come to between J. F. Nicholson, the workman, and J. R. Piper, the employer, on 1 February, 1904, and duly recorded in this Court on 2 December, 1904, be this day terminated and that the weekly payment to the workman thereunder be ended accordingly.”

In July, 1906, the workman made an application for the review and increase of the weekly payment.

The County Court Judge held that the matter had been finally determined by him by his award at the previous hearing, whereby the weekly payment had been terminated.

There was therefore no weekly payment which could be reviewed or increased.

For these reasons, the Judge refused to hear any evidence as to change of circumstances and dismissed the application.

The workman appealed.

The Court of Appeal and the House of Lords dismissed the appeal.

EARL OF HALSBURY : If the order is, as it is to my mind, clear and intelligible, and does preclude any future applications by reason of the recurrence of incapacity, the form of the order was a subject-matter of appeal, and the workman could have appealed. But he has not appealed. The result of that is that you have now an order which the learned Judge was capable of making, which, duly construed, puts an end to the right of the workman to apply again. That order was not appealed against, and therefore it is impossible for your Lordships to decide otherwise than as the Court of Appeal has decided, that this is an order, properly made within the learned Judge's capacity, not appealed against, and therefore it must be obeyed. The form of the order is such that it is hardly possible to deny—indeed, it has been very faintly denied by the learned counsel—that it does put an end to the power of the workman to apply again.

LORD ROBERTSON : My Lords, I think that the judgment is right. This application is made under the 12th section of the 1st Schedule

of the Act [1897] [16th section of 1st Schedule, 1906]. That section provides, and provides only for revision of a weekly payment, and it postulates, as the thing to be operated upon by the Court, an existing weekly payment, susceptible of being "ended, increased, or diminished". Now here there is no such weekly payment extant, and on this short ground the application was untenable. My Lords, I am satisfied that, in the present instance, the County Court Judge, who ordered the payment to "end," intended a final termination.

LORD JAMES OF HEREFORD and LORD ATKINSON concurred.

TERMINATION OF AGREEMENT.

TAYLOR *v.* LONDON & NORTH-WESTERN
RAILWAY CO. [1912].

[HOUSE OF LORDS. A.C. 242; W.N. 53.]

FULLY REPORTED IN 5 B.W.C.C. 218.

A Judge has no power to terminate an agreement, but he can rightly end the weekly payment, either permanently, or until further order.

The County Court Judge found that the workman had completely recovered from the accident, and ordered the agreement to pay compensation to be terminated.

The workman appealed on the ground that the County Court Judge had no jurisdiction to either terminate the agreement or to permanently end the weekly payment.

The Court of Appeal and the House of Lords dismissed the appeal, but the House of Lords upheld the contention of the appellant that the order made by the County Court Judge was technically erroneous, and was of opinion that the case might be remitted to the County Court Judge for the informality to be cured if the appellant so wished.

No application, however, was made by counsel for either party to remit the case for this rectification of order as to form.

EARL LOREBURN, L.C.: I do not think there is anything in the decision of *Nicholson v. Piper* which prevents the County Court

Judge from adjudging that the weekly payment be ended until further order. The same result is, we are told, attained by a practice of ordering a merely nominal payment in order to keep the question alive. In my view either of these methods may be lawfully adopted ; an ending of payment may be either temporary or permanent. I agree with Lord Atkinson that in this case the order made by the County Court Judge is technically erroneous, because his jurisdiction was merely to say that the weekly payment should be "ended, diminished, or increased," whereas he has ordered that the agreement be terminated.

LORD SHAW : My Lords, I think that when the learned County Court Judge decreed that the agreement be terminated, it was meant by him, and is the natural implication of his adjudication, that the payment of compensation was ended. As, however, your Lordships think that the omission of a statement to the latter effect is an informality requiring to be cured, I agree that, if the appellant so wishes, the case may be remitted, to have this done.

On the merits, I agree that it was competent to the Judge to end the compensation for ever. That in my view is settled by *Nicholson v. Piper* (House of Lords, [1907], A.C. 215 ; 9 W.C.C. 128). But I am of opinion that the words "ended, diminished, or increased" include not merely ending the compensation for ever, but ending it for a time. The language and meaning of the Act are to the effect that compensation is to be made for and during the incapacity. Cases may easily be figured in which the capacity for work may, for a time, return, and then incapacity may again recur. A careful prognosis may indicate a certain periodicity of illness, with intervals of fitness for work, or it may suggest such an uncertainty of a continuance of health, as to cloud the workman's whole future with peril. These are just the cases in which the County Court Judge may feel bound to end the payment, not for ever, but for a time.

In the fear, apparently, of the word "ended" being more literally construed, the course has sometimes been taken of a nominal payment being adjudged so as to preserve a form of continuity, and, so to speak, to keep open the compensation account. This course is intelligible. I do not, any more than did Lord Halsbury in *Nicholson's* case, say that it is incompetent. But in my opinion, it is unnecessary. In the cases referred to, the simple

course is, according to my view, to make the payment end until further order.

LORD ATKINSON and LORD MERSEY concurred.

IS THE UNEMPLOYMENT DUE TO THE INJURY OR TO THE STATE OF THE LABOUR MARKET ?

CARDIFF CORPORATION *v.* HALL [1911].

[COURT OF APPEAL, 1 K.B. 1009 ; 80 L.J. (K.B.) 644 ; 104 L.T. 467 ; 27 T.L.R. 339.]

FULLY REPORTED IN 4 B.W.C.C. 159.

If it be established that the workman is fit for any kind of light work, there is no obligation on the part of the employer to show that the workman can actually obtain it, but, in many cases, the effect of the particular accident, in diminishing the chance of obtaining employment, is so personal a matter, that it can only be arrived at by evidence as to the results of the efforts to obtain it.

One Hall, a driver of a cart, was suffering from an injury to his left wrist, the result of a dislocation. The medical referee reported that "Osborne Hall (the workman) is now quite able to do any form of light work, more particularly such as would require principally the use of the right hand"; this largely supported the contention of the employers who had applied for a termination or alternatively a diminution of the weekly payment.

The County Court Judge reduced the payment.

The workman appealed, and contended that the employers must show not only that he was capable of doing work, but that he could actually obtain suitable employment; he himself had given evidence of several futile attempts in seeking employment.

Appeal dismissed (Cozens-Hardy, M.R., dissenting).

FLETCHER MOULTON, L.J. : The Courts have held that a workman is not entitled to compensation for unemployment due to the fluctuations of trade, or, to use the language of the present Master of the Rolls, in *Dobby v. Wilson, Pease & Co.* (2 B.W.C.C. 370), "the employer does not guarantee the state of the labour market". If the incapacity caused by the accident has practically ceased, so that the workman is able for the time being to do his own work, and a fit competitor for obtaining it, there is no difficulty in applying this principle. In these circumstances, if the workman cannot get employment, it must be due to the fluctuations of the labour market and not to the consequences of the accident, and therefore the employer is entitled to be relieved from making the weekly payments. It is, however, no easy task to apply it in a case where partial incapacity still remains. By reason of this partial incapacity the workman may be unable to resume his old work, and may be forced to take up something else for his livelihood. Or he may be able to pursue his old avocation earning lower wages. Or he may be able to earn his former wages at his own work when he can get employment, but suffers from being one of those who will be the first to be discharged so soon as employment gets slack. Under these circumstances the results of the accident may affect his earning power either by increasing the difficulty of obtaining employment, or by diminishing the remuneration when it is obtained, or by both combined. Now the effect of the particular accident, in diminishing the chance of obtaining employment, is in many cases so personal a matter, that it can only be arrived at by evidence as to the results of the efforts to obtain it. Such evidence is open to the objection that the difficulty of obtaining employment in the same or other trades may not be due solely to the effect of the accident, but also partly to the state of the labour market. This consideration no doubt increases the difficulty of the tribunal in arriving at a right decision, but it does not affect the admissibility, and, in some cases, the necessity of the evidence ; and the tribunal must use all the material before it, so as to separate as far as practicable that which is due to the one cause from that which is due to the other.

I should say that if the accident leaves the workman's labour in the position of an "odd lot" in the labour market, the employer must show that a customer can be found who will take it. For in

such a case we are not in truth dealing with fluctuations of the labour market at all. We are dealing with the chance of some one being found who can, and will, avail himself of the special residue of powers which have been left to the workman, and seeing that it is as a result of the accident that the workman has been made dependent on the finding of such a special employer, it is right that those, who are liable to pay to him compensation for his loss of earning power, should only be allowed to take credit for his partial capacity for work, if they can show that it can actually be made productive of remuneration to him.

Here the medical referee finds that the workman is now quite able to do any form of light work, and this agrees with the evidence adduced on behalf of the employer. It was therefore competent for the County Court Judge to treat this as a case in which there was no necessity for the employers to show that the injured man could actually get employment, because there was reliable evidence that his injury was not sufficient to prevent him doing any kind of light work. This is a well-recognized branch of labour, and his not being able actually to obtain employment in it might well be due to the fluctuations in the labour market. It is true that the workman gave evidence that he had made certain attempts to obtain employment, but had been unsuccessful. We have been supplied with a list of these attempts, and it appears that with the exception of one application at the General Post Office for employment as a postman, these applications were only for the post of watchman, and for employment in delivering bills. It was competent for the County Court Judge to consider that such employments were only specimens of the work he could do, not the only kind of work within his powers, and, therefore, that such evidence was insufficient to outweigh the direct evidence that the workman could do any kind of light work. I do not say that it was not competent to him to come to an opposite conclusion, but if it was competent for him to take this view, his award must stand. We cannot interfere with it.

I am of opinion that there was evidence before the County Court Judge on which he could properly find as he did. I am of opinion, therefore, that this appeal should be dismissed with costs.

BUCKLEY, L.J. : It has been laid down that, upon an original arbitration, the state of the labour market is altogether outside the

question of compensation ; that the question is not whether the man can in the then state of the labour market get a place, but whether as a result of the accident, he is under an incapacity for work, which prevents him from being as eligible, as he was before the accident, for a place. The same, in my opinion, is true upon an application to review. Having regard to any incapacity for work, personal to the workman, arising from the injury, what is the difference between the amount of his average weekly earnings before and the average weekly amount which he is earning, or is able to earn, in some suitable employment or business, after the accident ? This is the question to be answered. Physical capacity or incapacity is not necessarily alone to be considered. In some employments, personal disfigurement may preclude employment when physical capacity is just as good as before. In such case, personal disfigurement is an element to be taken into consideration. The circumstances, under which labour can command employment in the market, being all taken into consideration, the question is whether the accident has produced in the workman some incapacity for work, personal to himself, which prevents his obtaining employment ?

There was evidence of ability to earn, qualified only by some evidence of difficulty in getting employment. Under these circumstances, the Judge could, in my judgment, rightly find, as he did, that the circumstances had so altered as that the weekly sum ought to be reduced, and he has reduced it. For these reasons, I think that this appeal must be dismissed with costs.

DISFIGUREMENT.

BALL v. WILLIAM HUNT & SONS, LTD. [1912].

[HOUSE OF LORDS. A.C. 496 ; 81 L.T. (K.B.) 782 ; W.N. 145 ; 28 T.L.R. 428.]

FULLY REPORTED IN 5 B.W.C.C. 459.

If, because of a workman's apparent physical defects, the result of the accident, no one will employ him, however effective he may be in fact, he is entitled to compensation.

In 1894, one Ball, an edge-tool moulder, received an injury to his left eye. Three years subsequently he became blind in that eye as a result of the injury. It was not necessary then to remove the eye. To outward appearances the eye was quite normal.

Ball continued to earn his usual wages.

In 1910, an accident caused inflammation in the left eye which necessitated removal of the eye.

Compensation was paid to Ball until he recovered from the effects of the operation: a period of ten weeks.

Ball was unable to obtain work from his old employer or from others, because it was now apparent that he had but one eye.

Ball claimed compensation.

The County Court Judge held that any incapacity was due to the accident in 1894, which had caused the blindness, and he awarded in favour of the employers.

The Court of Appeal (Fletcher Moulton, L.J., dissenting) upheld the award.

The workman appealed to the House of Lords.

Appeal allowed.

EARL LOREBURN, L.C. : My Lords, in this case the appellant, the workman, was already blind of one eye when, in September, 1910, the blind eye was again injured by an accident in the course of his work and had to be removed. The result is alleged to have been that his disfigurement prevented his obtaining employment. He remained equally able to do work after as he was before September, 1910, but says that his partial blindness became apparent as it had not been before and so he could get no work. Can it be said that incapacity for work resulted from the injury of September, 1910? The injury did not prevent him from being able to work, but it did reduce him to a physical condition which prevented him from getting work suitable in the circumstances. In my opinion, if the County Court Judge thinks these facts are established (as I gather he did think), he ought to award compensation on the footing of total or partial incapacity, according as he may find. By section I, compensation is to be paid for personal injury by

accident within the terms of the Act. What the schedule does is to fix the scale and conditions. In the ordinary and popular meaning which we are to attach to the language of this Statute, I think there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch. I think this view is in accordance with previous decisions of the Court of Appeal. The principle is carefully discussed in *Cardiff Corporation v. Hall* ([1911], 1 K.B. 1009; 4 B.W.C.C. 159). And certainly the opposite view would leave a workman uncompensated for what may be very real and direct consequences of an injury. In my opinion this case should be remitted to the learned County Court Judge.

LORD ATKINSON: The argument for the employers resolves itself into this, that, as schedule I, (1) only provides for the payment of compensation in two cases (a) where the death of the workman results from the injury, and (b) where total or partial incapacity for work results from it, the workman in the present case cannot get any compensation because he is as able physically to do his work as he ever was, though no one will employ him to do it. In other words, that, in construing the words "incapacity for work" used in the schedule, the absence of a market for the workman's labour, though due not to the state of the labour market or to the fluctuations of trade, but to some defect personal to himself caused by the injury he has received, which renders his labour unsaleable, is to be left entirely out of consideration. His power of wages may be completely gone, yet for the loss of that power, directly resulting from the disfigurement caused by the accident, he is not to receive any compensation. Such a construction as this, it would appear to me, cuts down the right expressly conferred upon the workman by the Statute. It involves a repeal *pro tanto* of section 1.

The question, whether a schedule, such as this, can legitimately be construed in such a way as to cut down the right conferred by the statute, was considered in your Lordships' House in the case of *Lysons v. Knowles & Son* ([1901], A.C. 79; 3 W.C.C. 1).

There would be no meaning, it would appear to me, in these provisions making the amount of wages which were, are, or can be

earned, so much the basis of compensation, if the market for the workman's labour has to be left out of consideration. The earning of wages depends as much on the demand for the workman's labour as it does upon his physical ability to work. If, because of his apparent physical defects, no one will employ him, however effective he may be in fact, he has lost the power to earn wages as completely as if he were paralysed in every limb.

If it be, then, the paramount object of the Act to compensate for the loss of the power to earn wages, the workman whom, because of the injury caused by an accident, nobody will employ, comes within its purview as much as one who is rendered unable to do any work at all.

It may well be that the words "incapacity for work" would not, in their ordinary meaning *prima facie* apply to a case such as this, but it has been well established that, in the construction of a statute, it is perfectly legitimate to give, to some of its words, a meaning different from their ordinary meaning, where that is necessary to forward and effect the main purpose and object of the enactment.

LORD SHAW: My Lords, In *Carlin v. Stephen and Sons, Ltd.* ([1911], S.C. 901; 48 Sc.L.R. 862; 5 B.W.C.C., 486) Lord Salvesen analyses these English cases and says: "In my opinion, incapacity for the purposes of the Workmen's Compensation Act, is primarily physical incapacity, in which may well be included such personal disfigurement as may lessen the sphere of employment, although the power to work remains as good as before. It does not, in my opinion, include inability to get employment which arises from something not personal to the workman." My Lords, had the state of the Scotch decisions been in accord with these sentences, a difference between them and the English cases would have been far to seek.

I humbly think, accordingly, that the decision of the Court below should be reversed, and that the case should be remitted for adjudication by the arbitrator as to the amount of compensation to be awarded to the workman.

LORD MACNAGHTEN concurred.

INDEX.

A.

ACCIDENT,

- accelerating disease, bronchitis and chronic asthma, 59.
 - rupture of aneurism, 62.
- “ arising out of and in the course of the employment,” 21—44, 63, 67, 76.
- cumulative effect, 12.
- definition, 1, 6—7, 63, 80.
- effect may be seen in results of efforts to obtain employment, 116, 119.
- onus of proof, 2, 18, 20, 23, 36—38.
- person, brakeman, 37.
 - captain of ship, 34.
 - cashier, 79.
 - collector and canvasser, 43.
 - collier. *See* COLLIER.
 - driver of cart, 46.
 - railway engine, 35.
 - taxi-cab, 45.
 - gamekeeper, 80.
 - infant workmen, 109.
 - messenger, 28, 43.
 - seaman. *See* SEAMAN.
 - steward of ship, 101.
 - stoker of ship's furnaces, 97.
 - trimmer 5.
 - watchman, 33.
 - window cleaner, 50.
- place, beyond ambit of United Kingdom, 15.
 - employers' premises when leaving work, 40.
 - highway, 43.
 - licensed path, 41.
- presumed, apoplexy, 18.
 - drowning, 19—24.
 - heart failure and lung inflammation, 13.
- question of law, 2, 40.
- type, aneurism, 62.
 - anthrax, 2, 11.
 - apoplexy, 18.
 - blood poisoning, 58.
 - bronchitis, chronic asthma, pneumonia, 59.
 - disfigurement, 119—122.
 - drowning, 20—34.
 - effluvia from drains, 8.
 - eye, 119—122.
 - fainting, 64—65.
 - frost bite, 46.
 - heart failure and lung injury, 13.

INDEX

ACCIDENT—*continued*.

- heat stroke, 5.
- hernia, 1.
- “horseplay,” 80.
- lightning, 79.
- misconduct, 66—76.
- murder, 79.
- negligence, 77.
- tripping and falling at work, 64.

ACCELERATION

- of pneumonia, bronchitis and chronic asthma, 59.
- rupture of aneurism, 62.

ACT. *See* SECTION *and* SCHEDULE.

- giving a different meaning to a word, 122.
- interpretation, 2, 6, 16, 23, 36, 42, 45, 47, 49, 52—55, 60, 63—64, 80, 83, 90, 95, 99, 100, 109, 110, 120—122.
- interpretation and legal effects of the Act, when applied to ascertained facts are questions of law, 2.
- judicial interpretation is of the Act itself, not of what ought to be in the Act, 109.
- mainly silent on conditions of medical examination of workman, 56.
- provisions do not amount to a life insurance, 23.
- reading words into the Act, 100, 109—110.
- schedule is not to be construed so as to cut down the rights under the Act, 121.
- territorial application, 16.

ACTS,

- Coal Mines Regulation Acts, 70, 73.
- Employers' Liability Act, 1880, 87.
- Factory and Workshop Act, 1901, 77.
- Merchant Shipping Acts, 99.
- Succession Duty Act, 100.

ADMISSIBILITY,

- evidence of efforts to obtain suitable employment, 117.
- statements of a deceased person, 13.

AGREEMENT,

- judge cannot terminate an agreement, 114.
- to accept scheme of compensation certified by Register of Friendly Societies, 54.

AMBIT,

- accident beyond ambit of United Kingdom, 15.
- of employment, watchman falling from quay ladder, 31.
 - sea-captain falling from quay, no evidence that he was ashore on ship's business, 34.
 - workman injured on employers' premises when leaving work, 40.

ANALOGY,

- argument by analogy in matters of fact, 17, 42.

ANEURISM

- rupture, 62.

INDEX

- ANTHRAX**
poisoning, 2, 11.
- APOPLEXY**,
no evidence that apoplexy was brought on by a strain, 18.
- APPLICANT.** *See* **ONUS OF PROOF.**
- APPLICATION**,
when a weekly payment has been terminated, a subsequent application for a review cannot be entertained, 112.
- ARBITRATOR.** *See* **JUDGE OF COUNTY COURT.**
reference of dispute to arbitrator, a condition in insurance policy ; insolvency of employer, 84.
- ARBITRATION**,
evidence of medical man given at Coroner's inquest, read as evidence, by agreement, at arbitration, 13.
evidence of witness at Coroner's inquest contradictory to that given at the arbitration, 13.
- " ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT."**
See **ACCIDENT and EMPLOYMENT.**
- ARTERY**,
degeneration of artery, rupture, apoplexy, 18.
rupture of aneurism, 62.
- ASSIGNMENT**,
charge or set off against weekly payments not allowed, 108.
- ASTHMA**
and chronic bronchitis accelerated as a result of an accident, 59.
- AVERAGE WEEKLY EARNINGS.** *See* **EARNINGS.**
- AWARD**,
it is not competent for an arbitrator to make a prospective award, 106.
may terminate the weekly payments either permanently or until further order, 112—114.
suspensory award, 111.

B.

- BACTERIA**,
anthrax, 2, 11.
from drains, 11.
- BAILMENT**,
contract as to bailment, was the employee a servant ? 45.
- BANKRUPTCY**,
or winding up, 83.
- BICYCLE**,
fall from bicycle on highway, permitted mode of locomotion, 43.

INDEX

BLOOD POISONING

- alleged to be due to refusal to undergo surgical operation, 58.
- due to inhaling the effluvia from drains, 8—12.

BLOOD VESSEL,

- rupture of aneurism, 18, 62.
- rupture of artery causing apoplexy, 18.

BRAKESMAN,

- accident to brakesman in charge of train, 37.

BREECH

- by employers of a clause in the insurance policy, 83.
- of instructions, illustrations, outside scope of employment, 76.
- of regulations by workman, opening gate fencing pit shaft, 70.
 - engine-driver leaving railway engine, 33, 35—36.
 - fellow-workmen causing injury, indemnity to employer, 77.
 - getting into a moving train of trucks, 66.
 - hewing coal at a prohibited spot, 67.
 - riding in empty traction tub in coal mine, 73.
- of regulations may be *prima facie* evidence of misconduct, but not of serious and wilful misconduct, 71—72.

C.

CALCULATION. *See* EARNINGS.

CAPTAIN

- of ship, fall from quay wall, no evidence that he was ashore on ship's business, 34.

CARELESSNESS,

- brakesman performing duties in a careless and dangerous manner, 38.
- riding a bicycle on highway, no evidence of carelessness, 44.

CASHIER

- robbed and murdered, 79.

CASUAL LABOUR,

- taxi-cab driver, 45.
- window cleaner, 50.
- waiter, 52.

CAUSE OF INJURY,

- contributory cause, accident accelerating lung disease, 60.
 - ordinary work causing a hernia, 1.
 - strain causing rupture of aneurism, 64—66.
- question of law whether it be an accident arising out of and in the course of the employment, 2, 40.
- statements by deceased person, 12.
- the *causa proxima* not alone to be considered, 64.

CERTIFICATE

- by surgeon as to industrial disease, 9.

INDEX

CESSPOOL,

blood poisoning due to inhalations from cesspool, 8.

CHEST. *See* LUNG.

CLAIMANT. *See* ONUS.

CLAIM FOR COMPENSATION. *See* COMPENSATION.

need not be for a specified sum of money, 52.

receipt by workmen in full discharge of all claims does not necessarily on his death deprive his dependants of rights under the Act, 87.

right of dependant to make a claim transmits to the legal personal representative, 85.

COAL MINER. *See* COLLIER.

COAL MINES REGULATION ACTS, 70, 73.

COLLECTOR,

a collector and canvasser killed while cycling on highway, 43.

COLLIER,

average weekly earnings, computation, 103.

death, boy killed in course of work at colliery, pecuniary value of services to the father—a barber—as dependant, to be estimated, 96.

boy riding in empty traction tub in the mine, misconduct, 73.

colliery worker killed while getting into a moving train of trucks, misconduct, 66.

dependency of a posthumous illegitimate child, 95.

dependency of widow not proved, 93.

fall of coal, misconduct, 67.

father and two sons killed in colliery accident, widowed mother dependent on each, 89.

injury, attack of apoplexy in the mine, subsequent death, 17.

fall of stone on knee, acceleration of lung trouble, 59.

fall down the pit shaft, misconduct, 70.

on colliery premises when leaving work, 40.

slipping on the steps of a licensed path, 41.

COMPENSATION. *See* CLAIM FOR COMPENSATION.

dependants disentitled, misconduct of workman, risk outside duties, 66—69.

for incapacity to obtain employment, because of disfigurement, 119—122.

nominal amount to keep alive the right to obtain compensation, 111—115.

partial dependant to receive an amount of compensation reasonable and proportionate to the pecuniary loss sustained, 92.

scheme of compensation certified by Registrar of Friendly Societies, jurisdiction of County Court Judge ousted, 54.

terminable permanently or until further order, 112—115.

COMPLAINTS,

complaints by a deceased person as to his injuries, 14.

COMPUTATION. *See* EARNINGS.

INDEX

CONCURRENT CONTRACTS OF SERVICE, 97.

CONDITIONS. *See* REGULATIONS.

CONJECTURE, SURMISE OR GUESS, 17, 20, 22, 23, 36—38. *See* EVIDENCE.

CONTRACT

of employment not evidenced by a mere licence, 41—42.

specific in certain respects, 31—33.

service, concurrent contracts, 97.

did it exist, 44.

risk not entailed in contract, 66—69, 73—76.

CONTRIBUTORY CAUSE. *See* CAUSE OF INJURY.

CORONER'S INQUEST. *See* ARBITRATION.

COUNTY COURT JUDGE. *See* JUDGE.

CROWN,

the Crown may be an employer so as to give rise to a concurrent contract of service, 97.

CUMULATIVE EFFECT

extended over a period constituting an injury, is not attributable to an "accident," 12.

D.

DEATH. *See* ACCIDENT.

at work, factors to be considered, 65—66.

DEBILITY,

aneurism ruptured, 65.

heat stroke accident, 5—7.

lung trouble accelerated, 60.

DECEASED PERSON,

pecuniary value of all services to the dependant to be estimated, 96.

statements as to cause of injury inadmissible, 12.

DECLARATION OF LIABILITY. *See* LIABILITY.

DEFINITION OF ACCIDENT, 1, 6—7, 63, 80.

DEGREE. *See* ONUS OF PROOF.

degrees of probability, 39.

necessary degree of proof cannot be measured by scale, 36—37.

strain

standard of exertion, 65.

DELUSIONS,

alleged delusions, suicide not to be presumed, 19.

INDEX

DEPENDENCY, 85—97.

- claim fails, no evidence of dependency, 93.
- dependant, on several workmen, may receive compensation in respect to the death of each, 89.
 - compensation, to one partially dependent, to be reasonable and proportionate to the pecuniary loss sustained, 92.
- disentitled, misconduct of workmen, risk unconnected with contract of service, 66—69.
 - not necessarily deprived of right to compensation by workmen having given a receipt in full discharge of all claims, 87.
- pecuniary value of all services to the dependant to be estimated, 96.
- right to claim compensation transmits to legal personal representative, 85.
- question and amount of dependency, one of fact, 91, 93.

DISABLEMENT. *See* MISCONDUCT.

- serious and permanent disablement, 67—72.

DISAPPEARANCE

- of seaman from ship at sea, 23—24.
 - found drowned in port, 23.

DISCHARGE. *See* RECEIPT.

DISEASE. *See* ACCIDENT *and* ACCELERATION.

- schedule of industrial diseases, 7—10.

DISFIGUREMENT,

- cause of unemployment, the result of an injury by accident arising out of and in the course of the employment, 119—122.

DRAINS,

- blood-poisoning due to inhaling effluvia from drains, 8—12.

DRIVER

- of cart, frost-bite injury, 46.
 - railway engine, 35.
- taxi-cab, 45.

DROWNING,

- accident improperly presumed, 21.
- accident at sea in a storm rightly presumed, 24.
- fall of sea captain from quay wall, no evidence that he was ashore on ship's business, employers not liable, 34.
- fall of seaman from ladder when going on board the ship, 26.
 - watchman from quay ladder, within ambit of employment, 31.
- suicide not to be presumed, 20, 25.

DRUNKENNESS

- of seaman not proved, 27.
- watchman not proved, 31, 33.

E.

EARNINGS,

- average weekly earnings of coal miner, 102.
- father and two sons killed in colliery accident, widowed mother dependent on earnings of each, 89.

INDEX

EARNINGS—*continued*.

- perquisites or "tips" of ship's steward, 101.
- probable earnings of infant workman had he not been injured, 109.
- remuneration of taxi-cab driver, question of fact as to contract of service, 45.
- retaining fee to a stoker in the Royal Naval Reserve, concurrent contracts of service, 97.

EFFORTS,

- workman medically reported to be fit for any kind of light work, desirability of evidence as to the results of his efforts to obtain employment, 116.

EMPLOYER,

- breach by employer of clause in insurance policy, 83.
- did the relation of master and servant exist, 45.
- does not guarantee the state of the labour market, 117.
- indemnity to employer by workmen for injuries to fellow-employee, 77.
- insolvency, 84.
- joint negligence with a third party, no indemnity to employer, 82.
- liability not terminated on death of dependant, 86.
- the Crown may be an employer so as to give rise to concurrent contracts of service, 97.
- trade or business with regard to casual labour, 50.

EMPLOYERS' LIABILITY ACT, 1880,

- reference to the Employers' Liability Act, 1880, in a receipt in full discharge of all claims, as a device to escape the necessity of obtaining the Court sanction to the settlement, 88.

EMPLOYMENT. *See* ACCIDENT and EMPLOYER.

- "accident arising out of and in the course of the employment," 21—44, 63, 67, 76.
- ambit of employment, accident without the United Kingdom, 15.
 - brakesman getting down from his van, 38.
 - driver quitting his engine, 35.
 - sea captain falling off quay wall, no evidence that he was ashore on ship's business, 34.
 - seaman falling into the water on return to ship,
 - off ladder, 26.
 - off quay wall, 29.
 - watchman falling off quay ladder, 31.
 - workman injured on employers' premises when leaving work, 40.
- contract of employment, not involved in a mere licence, 41.
 - not specific in certain respects, 31—33.
- inability to obtain employment, is it due to the injury or to the state of the labour market? 116.
- misconduct (generally), 33, 36, 66—76.
 - outside sphere of employment, 35, 66—69, 73—76.

ENDING OF WEEKLY PAYMENT,

- payment may be terminated permanently or until further order, 112—115.

ENGINE DRIVER,

- quitting engine for purposes of his own, accident not arising out of the employment, 35.

INDEX

ESTIMATION. *See* EARNINGS, PROBABILITY, INFERENCE, PRESUMPTION.

EVIDENCE. *See* INFERENCE, ONUS OF PROOF, PRESUMPTION.

estimation of probabilities from proved facts, 25.

evidence conflicting, was the employee—a taxi-cab driver—a servant? 45.

of medical witness at Coroner's inquest read, by agreement, at arbitration, 13.

witness at Coroner's inquest contradictory to that given at arbitration, 13.

no evidence of accident, apoplexy, 18.

fall into a canal, 20.

of seaman into the water, 22, 29.

heart disease and lung inflammation, 13.

that sea captain was ashore on ship's business, fall off quay wall, 34.

of drunkenness, 27, 31, 33.

incompetency or recklessness, collector cycling on highway, 44.

suicide, 20, 25.

prima facie evidence of misconduct but not of serious and wilful misconduct from a breach of regulations, 71—72.

statements by deceased person as to the cause of the injury, inadmissible, 12.

surmise, conjecture, or guess cannot suffice as evidence, 17.

EXAMINATION

of workman by medical man, conditions, 55.

EXECUTOR,

right of dependant to claim compensation transmits to executor, 85.

EYE,

compensation for inability to obtain employment because of disfigurement due to the loss of an eye by accident, 119.

F.

FACT,

argument by analogy in matters of fact, mainly unprofitable, 17, 42.

facts admitted, wrong inference as to law, 41.

no facts to warrant an inference, 20.

question of fact for arbitrator, dependency, 91, 93.

did the relation of master and servant exist, 45.

reasonableness of conditions of medical examination of workman, 55.

was a frost-bite due to accident arising out of the employment, 46.

whether a breach of regulations amounts to serious and wilful misconduct, 71.

questions of fact as distinguished from questions of law, 2, 40.

FACTORY AND WORKSHOP ACT, 1901,

breach by fellow-workmen, 77.

INDEX

FAINT. *See* FALL.

FALL,

- fall in a faint from a ladder, 64.
 - ship's rigging, 65.
- into a canal, no facts to warrant an inference, 19.
 - dock or sea. *See* SEAMAN.
- of miner on steps of a licensed path, employer not liable, 41.
 - collector when cycling on highway, 43.
 - brakesman in descending from van, improper motive not to be presumed, 37.
 - watchman from quay wall, ambit of employment, 31.
 - window-cleaner, casual labour, 50.
- tripping or falling at work may be an accident, 64.

FATHER,

- death of father and two sons in a colliery accident, dependency of widowed mother on earnings of each, 89.
 - dependency of posthumous illegitimate child, 95.
- pecuniary value of all services of a deceased son to his father—as dependant—to be estimated, 96.

FELLOW-WORKMEN,

- injury due to horseplay of fellow-workmen, 80.
- negligence of fellow-workmen, 77.

FINDING OF FACT. *See* FACT.

- finding of an arbitrator on questions of fact, based on evidence which he might reasonably accept as true, is unassailable, 46.
- findings of fact in one case are of little help in finding the facts in another, 17.

FRIENDLY SOCIETIES,

- Registrar of Friendly Societies, certified scheme of compensation, 54.

FROST-BITE, 46.

G.

GAMEKEEPER,

- injury by poachers, 80.

GERMS,

- anthrax, 2, 11.
- from drains, 8, 10, 11.

GRADUAL PROCESS,

- gradual process over a period not an accident, 12.

GUESS, SURMISE, OR CONJECTURE, 17, 20, 22—23, 36—38. *See* EVIDENCE.

H.

HEALTH,

- no necessary standard of health, 65.
- state of debility, aneurism ruptured, 65.
 - heat-stroke accident, 5—7.
 - lung trouble accelerated, 60.

INDEX

HEART DISEASE,
death due to heart disease and lung inflammation, 13.

HEAT-STROKE,
death by accident, 5.

HERNIA
sustained in course of ordinary work, 1.

HIGHWAY,
accident on highway, collector cycling, permitted mode of locomotion, 43.

“HORSEPLAY,”
injury due to horseplay and criminal act of fellow-employees, 80.

HUSBAND,
death of husband and two sons in a colliery accident, widowed mother proves dependency on earnings of each, 89.
widow fails to prove dependency, 93.

I.

ILLEGITIMATE CHILD,
a posthumous illegitimate child may be a dependant, 94.

INCAPACITY FOR WORK,
occurs when a workman's labour, as a result of physical defects—disfigurement—is unsaleable in any market reasonably accessible to him, 120—121.

INDEMNITY,
none to a joint tort-feasor, 82.
to employer when injury due to negligence of fellow-workmen, 77.

INDUSTRIAL DISEASE, 7—10.

INFANT WORKMAN. *See* MINOR.

INFERENCE. *See* EVIDENCE, FACT, ONUS OF PROOF, PRESUMPTION.
facts admitted, wrong inference as to law, accident on colliery premises when leaving work, 40.
no facts to warrant an inference, fall into a canal, 20.
of accident causing death of seaman by drowning, 21—24.
that a brakesman was leaving his van to carry out his duties, 37.

INJURY. *See* ACCIDENT.
cause, inadmissibility of statements of deceased person as to the cause of the injury, 12.
disease, when disease is an injury by accident, 7—8.
law, question of law whether the cause of injury is an accident in the meaning of the Act, 2, 40, 71.
unemployment, is it due to the injury or to the state of the labour market? 116.

INQUEST. *See* ARBITRATION.

INDEX

- INSANITY,
alleged delusions, suicide not to be presumed, 19.
- INSOLVENCY
of employer, 84.
- INSTRUCTIONS. *See* REGULATIONS.
- INSURANCE,
proceedings against insurance company, insolvency of employer, 83.
provisions of Act do not amount to a life insurance, 23.
- INTENTION,
a wrongful intention of workman not to be lightly presumed, 39.
- INTERPRETATION. *See* ACT, SECTION, SCHEDULE.
interpretation and legal effect of Act, when applied to ascertained facts, are questions of law, 2, 40.
- J.
- JUDGE OF COUNTY COURT. *See* FACT.
finding of a County Court Judge on questions of fact, based on evidence which he might reasonably accept as true, is unassailable, 46.
no power to terminate an agreement, 114.
make a prospective award, 106.
power to terminate weekly payment either permanently or until further order, 112—115.
- JUDICIAL DICTA
cited as in conflict with Statute, 42.
- JURISDICTION,
jurisdiction ousted, scheme certified by Registrar of Friendly Societies, 54.
- L.
- LABOUR. *See* CASUAL LABOUR, EMPLOYMENT, MARKET.
- LADDER,
fall in a faint from a ladder, 64.
seaman falling from ladder into the dock when boarding the ship, 26.
watchman falling from quay ladder, 31.
- “LARKING,”
injury due to “larking,” 81.
- LAW,
question of law, 2, 40, 71.
- LIABILITY. *See* ONUS OF PROOF.
of fellow-employees to pay an indemnity to the employer, injury caused by their negligence, 77.
employer with regard to domestic engagements, casual labour, 51—52.
not terminated by death of dependant, 86.
question of liability kept alive by a suspensory award, 111.
nominal payment, 115.

INDEX

LICENCE

does not constitute a contract of employment, 41—42.

LIFE,

provisions of Act do not amount to a life insurance, 23.

LIGHTNING,

injury by lightning, 79.

LIGHT WORK,

workman reported by medical referee to be fit for any kind of light work, no obligation on employer to show that the workman can obtain it, 116.

LOCOMOTION,

permitted mode of locomotion, collector killed while cycling on highway, 43.

LUMP SUM,

receipt of lump sum in full discharge, 87.

LUNG DISEASE

accelerated by accident, 59.

no evidence of accident, 13.

M.

MAINTENANCE. *See* DEPENDENCY.

of posthumous illegitimate child, 95.

seaman under Merchant Shipping Acts, 99.

probability as to the maintenance of a wife by her husband, 94.

MARKET,

labour market reasonably accessible to the workman, 120—121.

the employer does not guarantee the state of the labour market, 117.

MASTER,

did the relation of master and servant exist? ; taxi-cab driver, 45.

MEANING. *See* INTERPRETATION.

MEASURE. *See* ONUS OF PROOF, PROBABILITY, STRAIN.

MEDICAL

evidence given at Coroner's inquest read as evidence, by agreement, at arbitration, 13.

examination of workman, reasonableness of mode and conditions, 55.

MERCHANT SHIPPING ACTS,

previous payments under Merchant Shipping Acts, 99.

MESSENGER,

injury by accident, 28, 43.

MINER. *See* COLLIER.

MINOR,

estimation of probable earnings had he not been injured, 109.

INDEX

MISCONDUCT. *See* BREACH, INDEMNITY.

MOTHER,

death of father and two sons in a colliery accident, dependency of widowed mother on each, 89.

MOTIVE,

a wrongful motive on the part of the workman not to be lightly presumed, 39.

MURDER,

no evidence of murder, inference as to an accident, 25.

of cashier carrying wages for payment of workmen at a colliery, 79.
gamekeeper by poachers, 80.

N.

NEGLIGENCE. *See* BREACH, INDEMNITY.

NOMINAL PAYMENT. *See* LIABILITY.

O.

ONUS OF PROOF. *See* EVIDENCE, FACT, ONUS OF PROOF, PRESUMPTION.

improperly shifted by making a prospective award, 106.

necessary amount of proof cannot be measured by scale, 36—37.

not discharged when conflicting inferences of equal degrees of probability can be drawn, 39.

on applicant, 2, 17, 20, 23, 36—39, 45, 56, 106.

employer to show that the proposed operation would have cured the disability and that the refusal of the workman was unreasonable, 57.

workman to show that his request for the presence of his own doctor at the medical examination is reasonable, 56.

OPERATION,

refusal of workman to undergo surgical operation, 57.

OPTION

as to particular proceedings, 88.

ORDERS. *See* REGULATIONS.

ORDINARY,

ordinary work causing hernia, 1.

rupture of aneurism, 62.

OUSTING OF JURISDICTION,

scheme certified by Registrar of Friendly Societies, 54.

P.

PAYMENT. *See* DEPENDENCY, EARNINGS.

previous payments under the Merchant Shipping Acts, 99.

settlement by agreement for a lump sum, 87.

termination, 111—115.

INDEX

PERMISSION. *See* PROHIBITION.

a mere licence does not constitute a contract of employment, 41.
permitted mode of locomotion, collector cycling on highway, 43.

PERQUISITES, 100—102.

PERSONAL REPRESENTATIVE. *See* EXECUTOR.

PHYSICAL DEFECTS

amounting only to disfigurement, 119—122.

PLAINTIFF. *See* ONUS OF PROOF.

PNEUMONIA,

the result of an accident, 59.

POACHER,

injury to gamekeeper by poacher, 80.

POISONING,

blood poisoning, alleged to be due to refusal to undergo surgical operation, 58.

effluvia from drains, 8.

infection by anthrax germs, 2, 11.

POSSIBILITY,

possibilities as to drowning by accident or by suicide considered, fall into a canal, 20.

POSTHUMOUS ILLEGITIMATE CHILD

may be a dependant, 94—95.

PREMISES,

workman injured on employers' premises, when leaving work, 40.

PRESUMPTION. *See* EVIDENCE, FACT, INFERENCE.

no presumption of suicide, 19, 25.

that a wife is dependent on her husband's earnings,
because of his legal obligation to maintain
her, 94.

workman is moved by a wrongful intention, 39.

territorial application of a statute, 16.

PRINCIPAL,

"work undertaken by principal," s. 4, 49.

PROBABILITY,

accident, conflicting inferences of equal value, 39. *See* ONUS OF PROOF.

drowning, 24. *See* DROWNING.

that a brakesman was leaving his van to attend to his duties,
38.

earnings. *See* EARNINGS.

maintenance, of wife by her husband, 94.

posthumous illegitimate child, 95.

PROCEEDINGS,

"Proceedings independently of" the Act, 88.

INDEX

PROHIBITION. *See* BREACH.

no evidence of prohibition, 31—33, 43.

PROOF. *See* ONUS OF PROOF.

PROSPECTIVE AWARD,

arbitrator has no power to make a prospective award, 106.

Q.

QUAY,

sea captain falling from quay wall, no evidence of accident, 34.

seaman 29.

watchman ladder, evidence of accident, 31.

QUESTION OF FACT. *See* FACT.

QUESTION OF LAW, 2, 40, 71.

QUESTION OF LIABILITY. *See* LIABILITY.

QUITTING OF EMPLOYMENT,

by engine driver from his engine for purposes of his own, 35.

railway brakesman, not proved, 38.

watchman of steam trawlers to obtain refreshment, 31—33.

R.

RAILWAY. *See* QUITTING OF EMPLOYMENT.

RATE OF REMUNERATION. *See* EARNINGS.

READING. *See* ACT.

reading words into an Act, 100, 109—110.

RECEIPT

given by a workman in full discharge of all claims does not necessarily deprive his dependants of rights under the Act, 87.

RECTIFICATION. *See* REHEARING.

REDEMPTION. *See* RECEIPT.

REFRESHMENT,

accident within the ambit of employment, on the return from the obtaining of refreshment, 31—33.

REFUSAL

of workman to be medically examined unless his medical attendant is present, 55.

undergo surgical operation, 57.

REGISTRAR OF FRIENDLY SOCIETIES,

certified scheme of compensation, 54.

REGULATIONS. *See* BREACH.

INDEX

REHEARING

case remitted to County Court Judge, invalidity of a prospective award,
106—107.

to estimate pecuniary value of
certain services rendered by
the deceased to the dependant,
96.

permission given to remit case to County Court Judge for rectification
of order as to form, 114.

REMITTING OF CASE. *See* REHEARING.

REMUNERATION. *See* EARNINGS.

REPRESENTATIVE. *See* EXECUTOR.

RETAINER

to stoker of Royal Naval Reserve, concurrent contracts of employment,
97.

REVIEW. *See* COMPENSATION, DEPENDENCY.

RIGHTS. *See* DEPENDENCY.

the schedule is not to be so construed as to cut down rights under the
Act, 121.

RISK OF INJURY

from frost-bite, 46.
lightning, 79.
poachers, 80.
robbery, 79.

outside sphere of employment, 66—69, 73—76.

ROBBERY. *See* RISK.

RULES. *See* BREACH.

RUPTURE

hernia, 1.
of artery, apoplexy, 18.
aneurism, 18, 62.

S.

SCHEDULE,

not to be so construed as to cut down the rights under the Statute,
121.

Schedule 1, clause 1 payment of compensation, disfigurement,
119—122.

2 (a) computation of earnings, 101.

2 (b) concurrent contracts of service, 97.

3 previous payments, 99.

16 review of weekly payments, 113—114.

probable earnings of infant workman had
he not been injured, 109.

19 weekly payment cannot be assigned, 108.

schedule of industrial diseases, 7—10.

INDEX

SCHEME,

scheme of compensation certified by Registrar of Friendly Societies, 54.

SCOPE OF EMPLOYMENT. *See* EMPLOYMENT.

SEAMAN,

accidents beyond the United Kingdom, 16.

accident to seaman as such must be one specifically connected with the ship, 28—30.

ashore with and without leave, 27—30.

drowning, disappearance at sea, presumption of accident during a storm, 23—24.

probability of accident from proved facts, 25.

fall from quay, no evidence that captain ashore on ship's business, 34.

ship's ladder on the return to the ship, 26.

found drowned near ship, no evidence of accident, 21, 29.

ship's steward, ship lost at sea with all hands, estimation of perquisites, 100—102.

watchman of steam trawlers, fall from quay ladder, ambit of employment, 31.

drunkenness not proved, 27, 31, 33.

SECTION,

Section 1 (1) ambit of United Kingdom, 15.

1 (2) (c) serious and wilful misconduct, 70.

2 (1) claim for compensation, 52—53.

3 scheme of compensation certified by Registrar of Friendly Societies, jurisdiction of County Court Judge ousted, 54.

4 work undertaken by the principal, 48—49.

5 insolvency of employer, 83—84.

6 question of indemnity, 77, 82.

7 seaman, 15—16.

SERIOUS AND WILFUL MISCONDUCT. *See* BREACH.

SERVANT. *See* SERVICE.

SERVICE,

contract of service, concurrent, 97.

did it exist? 44—45.

not involving certain risks, 66—69, 73—76.

not specific in certain respects, 31—33.

pecuniary value of certain services rendered by a deceased son to his father, as dependant, to be estimated, 96.

“SET OFF”

not allowed, 107.

SETTLEMENT. *See* RECEIPT.

SEWER,

blood-poisoning due to inhalations of sewer gas, 8—12.

SHERIFF. *See* JUDGE OF COUNTY COURT.

SHIP. *See* SEAMAN.

INDEX

- SHIPPING,
previous payments under the Merchant Shipping Acts, 99.
- SKATING-RINK,
accident to employee of building contractor, promoters not liable as principals, 48.
- SON,
death of father and two sons in a colliery accident, dependency of widowed mother on earnings of each, 89.
pecuniary value of certain services of deceased son to his father as dependant, to be estimated, 96.
- SPHERE OF EMPLOYMENT. *See* EMPLOYMENT.
- STANDARD,
no necessary standard of health, 65.
standard of exertion whereby strain can be measured, 65.
- STATEMENTS,
statements of deceased person, 12.
- STATUTE. *See* ACT.
- STEWARD,
estimation of earnings of ship's steward, perquisites, ship lost at sea with all hands, 100—102.
- STOKER,
retainer to stoker in Royal Naval Reserve, concurrent contract of service, 97.
- STONE,
fall of stone on collier's knee, subsequent acceleration of lung disease, 60.
- STRAIN,
no evidence of strain causing apoplexy, 18.
standard of exertion whereby strain can be measured, 65.
strain of ordinary work causing hernia, 1.
rupture of aneurism, 18, 62.
- SUCCESSION DUTY ACT,
reading words into an Act, 100.
- SUICIDE,
no evidence of suicidal tendency, 20.
not to be presumed, 19, 25.
- SURGEON,
certificate of surgeon as to industrial disease, 9.
- SURGICAL OPERATION,
onus on employer to show that the proposed operation would effect a cure, and that the workman unreasonably refused to undergo it, 57.

INDEX

SURMISE. *See* EVIDENCE.

surmise, guess, conjecture, 17, 20, 22—23, 36—38.

SUSPENSORY AWARD. *See* LIABILITY.

T.

TAXI-CAB DRIVER,

a question of fact whether the driver was a workman within the meaning of the Act, 45.

TERMINATION OF WEEKLY PAYMENT. *See* JUDGE, LIABILITY.

weekly payment may be terminated permanently or until further order,
112—115.

TERMS. *See* BREACH.

TERRITORIAL APPLICATION OF THE ACT,

ambit of the United Kingdom, presumption, 16.

THIRD PARTY,

joint negligence of third party with employer, no indemnity to employer, 82.

TIPS, 100, 102.

TORT,

no indemnity to a joint tort-feasor, 82.
tort by fellow-workman, 77, 81.

TOXIN,

toxin poisoning, 8, 11.

TRADE,

trade or business of principal, interpretation of "work undertaken by the principal," 48.
with regard to casual labour, 50.

U.

UNEMPLOYMENT,

is it due to the injury or to the state of the labour market? 116.

UNITED KINGDOM,

accident beyond ambit of United Kingdom, 15.

UNREASONABLE REFUSAL. *See* REFUSAL.

V.

VIOLATION. *See* BREACH.

W.

WATCHMAN,

watchman of steam trawlers, fall from quay ladder, ambit of employment, 31—33.

INDEX

WEEKLY EARNINGS. *See* EARNINGS.

WEEKLY PAYMENT. *See* PAYMENT.

WEIGHING OF PROBABILITIES. *See* PROBABILITY.

WIDOW. *See* DEPENDENCY.

death of husband, widow fails to prove dependency, 93.

death of husband and two sons in a colliery accident, dependency of widowed mother on earnings of each, 89.

WINDING UP

or bankruptcy, 83.

WINDOW CLEANER,

accident, 50.

WITNESS. *See* ARBITRATION.

WORK,

death at work, factors to be considered, 65—66.

leaving work, accident on employers' premises when leaving work, 40.

light work, when workman reported by medical referee to be fit for any kind of light work, there is no obligation on the employer to show that he can obtain it, 116.

ordinary work causing hernia, 1.

rupture of aneurism, 62.

"work undertaken by principal," meaning, 48.

WORKMAN. *See* ACCIDENT, BREACH.

earnings. *See* EARNINGS.

accessibility of labour market, 120—121.

refusing to be medically examined, stipulation as to presence of his own doctor, 55.

- undergo surgical operation, 57.

settlement by workman for a lump sum, does not necessarily on his death deprive his dependants of rights under the Act, 87.

was the employee a workman within the meaning of the Act, 45.

wrongful intention on the part of workman not to be lightly presumed, 39.

WRONGFUL INTENTION. *See* WORKMAN.

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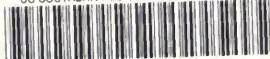
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